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MORALS IN EVOLUTION

A STUDY IN COMPARATIVE ETHICS

BY

L. T. HOBHOUSE

LATE FELLOW AND ASSISTANT TUTOR OF CORPUS CHRISTI COLLEGE, OXFORD,
FORMERLY FELLOW OF MERTON COLLEGE

PART I

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PREFACE

THE purpose of the present work is to approach the theory of ethical evolution through a comparative study of rules of conduct and ideals of life. In this branch of evolutionary science theory and fact sometimes tend to fall apart. Hypotheses may be formed by the method of brilliant conjecture without any firm basis in the actual history of the moral consciousness, while that history as revealed in the mass of recorded customs and doctrines concerning conduct sometimes tends to be lost in a mass of anthropological detail wherein it is impossible to see the wood for the trees. The attempt made in these volumes is to ascertain the main features of development, and by piecing them together to present a sketch in which the essentials of the whole process will be depicted in outline.

In this method of handling the subject, no hypothesis as to the causes of evolution is required. Even the hypothesis of evolution itself is not strictly necessary. Our object is to distinguish and classify different forms of ethical ideas—a morphology of ethics comparable to the physical morphology of animals and plants. The results of such a comparative study, if firmly based on recorded facts, would remain standing if the theory of evolution were shattered. At the same time, here as elsewhere, the results of classification when seen in the light of evolutionary theory acquire a wholly new significance and value. They furnish us with a conception of the trend of human development based not on any assumption as to the underlying causes at work, but on a matter-of-fact comparison of the achievements reached at different stages of the process itself.

Little, therefore, will be said here of the psychological forces which underlie the ethical consciousness; little of the sociological and other factors which accelerate or retard development. These lie for the most part outside our immediate province. It is the essential facts of development itself that we are seeking to ascertain. Such an inquiry encounters many difficulties of its own. Vast and complex subjects must be handled with a brevity which to one specially interested in them will appear quite inadequate. The conclusions of a hundred specialisms must be used by one who from the nature of the case cannot himself be a specialist in any of them. Hence the openings alike for error of detail and for disproportion of general handling are great. Nor is it possible to avoid subjects of controversy. For the study of development, the ethics of civilization are not less, but, if anything, more important than those of savagery, and have therefore received closer attention in this work. But the complexities of civilized ethics, interwoven as they are with religious and political doctrines, can only be treated within the limits of a general sketch by keeping strictly to what is distinctive and fundamental in each system, and of this only so much is selected for discussion as is deemed to have a bearing on ethical development. In such selection the general philosophic bias of the inquirer is only too apt to have an influence. Further, it is a part of the plan of the work to estimate critically the position of each system in the line of ethical development, and in such criticism it is still harder to put aside all preconceived opinions. The alternative would be to omit the ethics of Christendom and the problems of modern thought altogether. This I felt would mutilate the inquiry, and I have accordingly endeavoured to treat these subjects precisely on the same footing and in the same spirit as others, that is to say, as phases of development to be critically but quite impartially examined. In the sketch of modern philosophy, however, I have briefly set forth the analysis of the fundamental problems which expresses my own views, and in the final chapter I have drawn some broad conclusions from the general trend of ethical development.

My obligations to other writers are, I hope, adequately acknowledged in detail. Dr. Westermarck's important work

on the *Origin and Growth of the Moral Ideas* would have been of immense value to me had it appeared a little earlier. It is particularly satisfactory to me to find that so far as we cover the same field my results generally harmonize with his, and this notwithstanding a material divergence in ethical theory. On almost every page of some of my chapters references to his volume might be added to my footnotes, and with certain questions raised by his inquiry I have dealt in an appendix. I have to thank many friends for advice as to reading on special subjects. Among them I should like to name Mr. Hagberg Wright of the London Library, Mr. Ll. Griffith, and the late Mr. W. T. Arnold. Prof. Vinogradoff and Dr. Estlin Carpenter have most kindly read large portions of the MS., and suggested many valuable criticisms, though of course neither of them is to be held responsible for anything that is here printed. Lastly, I have to thank Dr. Slaughter, Secretary of the Sociological Society, and Miss M. Harris, for undertaking the heavy and responsible task of verifying the references.

L. T. HOBHOUSE.

Wimbledon, June 1906.

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CHAPTER I

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THE SCOPE AND METHOD OF COMPARATIVE ETHICS . . . 1

(1) The guidance of life by acknowledged principles is peculiar to humanity; (2) Yet throughout the organic world action is regulated—in the lowest stages by hereditary structure; (3) As such it takes the form of Reflex Action, or of Instinct. (4) Among the higher animals instinctive action is modified by the intelligent use of experience. (5) In man instinct appears as hereditary character, the operation of which is largely shaped by tradition. (6) Traditional custom arises from the interaction of personal forces; (7) and the morality which it embodies is imperfect; (8) but must from the first correspond roughly with the essential conditions of social life, and as intelligence grows is re-modelled by a more distinct conception of the good. (9) The history of the conception of the good is the proper subject of Comparative Ethics. Religious and social developments must be traced so far as they affect this conception; (10) and without writing a history of conduct we must distinguish between ideals and work-a-day rules of action. (11) Difficulties in applying the Comparative Method due to the blending of similarity with difference in ethical conceptions. (12) Our first aim must be a classification of ethical types which we must, next, compare with different stages of general development; (13) dealing first with the Standard of action and then with the Basis we may finally approach the question whether there is or is not a discernible line of Ethical development.

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The two sides of development, social duty and personal right at times appear to conflict, but in their full development are mutually dependent. Their reconciliation the principle of the highest social organization.

PRINCIPAL AUTHORITIES AND ABBREVIATIONS.

THE principal authorities used in this work are given in the following list. Foot-note references in most cases give the name of the author only, together with the volume and page cited, but the full title of each work and the edition used is given in the appended list. Wherever any other form of abbreviation is used than that of the author's name, it will be found following the full title in square brackets.

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MORALS IN EVOLUTION

CHAPTER I

GENERAL CHARACTERISTICS OF ETHICAL EVOLUTION

1. THE object of the present work is to trace the evolution of the ethical consciousness as displayed in the habits and customs, rules and principles, which have arisen in the course of human history for the regulation of human conduct. In no part of the world, and at no period of time, do we find the behaviour of men left to unchartered freedom. Everywhere human life is in a measure organized and directed by customs, laws, beliefs, ideals, which shape its ends and guide its activities. As this guidance of life by rule is universal in human society, so upon the whole it is peculiar to humanity. There is no reason to think that any animal except man can enunciate or apply general rules of conduct. Nevertheless there is not wanting something that we can call an organization of life in the animal world. How much of intelligence underlies the social life of the higher animals is indeed extremely hard to determine. In the aid which they often render to one another, in their combined hunting, in their play, in the use of warning cries, and the employment of "sentinels," which is so frequent among birds and mammals, it would appear at first sight, that a considerable measure of mutual understanding is implied, that we find at least an analogue to human custom, to the assignment of functions, the division of labour, which mutual reliance renders possible. How far the analogy may be pressed, and whether terms like "custom" and "mutual understanding," drawn from human experience, are rightly applicable to animal societies, are questions on which we shall touch presently. Let us observe first that as we descend the animal scale

the sphere of intelligent activity is gradually narrowed down, and yet behaviour is still regulated. The lowest organisms have their definite methods of action under given conditions. The Amœba shrinks into itself at a touch, withdraws the pseudopodium that is roughly handled, or makes its way round the small object which will serve it as food. Given the conditions, it acts in the way best suited to avoid danger, or to secure nourishment. We are a long way from the intelligent regulation of conduct by a general principle, but we still find action adapted to the requirements of organic life.

2. Thus in the lowest grades of the organic world behaviour is already regulated, and regulated to some purpose. It will repay us to consider very briefly the method of this regulation, and to observe how it changes as we ascend the organic scale. In the lowest grades of life, then, whether plant or animal, we find behaviour pretty rigidly determined by the structure of the organism itself. The sensitive plant or the protozoon does not act at random, but it is so constructed that when stimulated in a particular way by some outer object it responds to this stimulus by some definite motion. In this way, for example, the tentacles of the Venus' Flytrap close over the luckless insect which has settled upon its leaf, a touch on any one of the spines of the leaf causing the two halves of the leaf-end to fold inward as on a hinge. The insect is thus enclosed, and certain glands upon the leaf secrete the digestive juice to aid in its assimilation.[1] In the same apparently mechanical manner the tentacles of a sea-anemone close over a small object which lodges among them. Actions of this kind, which may generically be called reflexes, for the most part serve a function which we can readily discover and assign in the life of the organism; for example, in the instances mentioned they secure its food. But though they serve this purpose it is almost certain that we should be mistaken in regarding them as purposeful or intelligent in character. Reflexes of this type

[1] Lloyd Morgan, *Animal Intelligence*, p. 26. Observe that innutritious objects, such as particles of sand, do not cause a regular contraction of the tentacles, though their impact is followed by a secretion. In other words, the re-action only follows in its completeness in cases where it serves a purpose.

proceed with equal certainty and regularity, whether in the particular case they happen to be good or bad for the organism. We can most easily understand their character by considering any one of the numerous reflex actions which we ourselves perform. If a small foreign object—a speck of dust or a crumb of food—gets into our windpipe, we cough; that is to say, a series of muscular contractions is set up whereby the foreign body is expelled. This serves a purpose which is very useful to us, but it is not done by the aid of our intelligence. It is done by our nerves and muscles upon their own account without the aid of our will, and even, as we know, sometimes against our will. Similarly, if an object comes straight at our eyes, we blink, and we do so even though we know we are not going to be hit. The blink normally serves the purpose of protecting the eyes, but the number of people who can refrain from blinking when it is known to be useless is comparatively small. We blink on any given occasion, not because as intelligent persons we wish to protect our eyes, but because a certain structure of nerves and muscles exists in us, which, being touched as it were by the stimulus of something coming straight at the eyes, is brought into operation automatically. This structure is ordinarily useful to us. Similarly, it was useful to our ancestors, and the biological theory is that it has grown up and been perpetuated in us because from generation to generation it has on the balance been found useful. Those in whom it failed would be likely to lose their sight, and with their sight they might well lose their lives, and losing their lives they would fail to leave descendants, and so their stock would become blotted out. Conversely, the same conditions would favour the perpetuation and increase of a stock in which the structure was well developed. This explanation may be applied to all the simplest methods of adjusting responses to stimulus. In every generation those individuals who best responded to the circumstances in which they were placed from time to time would tend to survive in the largest numbers. The physical structure best suited to give these responses would thus be perpetuated, and while the variations for the worse would be eliminated the variations for the better would be preserved. In this way, according to the biological theory, physical structures arise which fixedly determine the

most suitable kind of response to the kind of stimuli which most frequently affect organisms of any given species. Thus, without the exercise of any intelligence on the part of any individual organism, without the formation of the idea of a purpose at any single point in the whole history, certain fundamental purposes are, nevertheless, served, and the conditions which secure that they should be served are perpetuated. Here, then, we have a form of the regulation of behaviour proceeding without the intervention of any intelligent agency.[1]

3. As judged from the point of view of its efficiency in preserving the race, this method of regulating conduct has many defects. It is excessively rigid and excessively narrow. If a given contraction must follow a given touch, the results may upon the whole be good, but they may also in many instances be bad. Poisonous substances may be swallowed instead of nutritious food; dangerous enemies may be approached as though they were prey. Observation of young animals reveals many instances of this want of adaptation, and many of the actions, which at first sight so wonderfully dovetail into one another as to suggest a marvellous foresight of what the animal will require, turn out on further investigation to be blind responses to a physical stimulus which very often lead to fatal results. One instance may suffice here:—The larva of the Sitaris beetle provides for its future career by attaching itself to a bee which finds it in all necessaries. But it is not any knowledge of the bee and what the bee will do for it which impels the larva, for it will similarly attach itself to any hairy object which may come near—for example, to any other hairy insect; and probably a large number perish in this manner.[2] The larva is so constructed, in fact, that contact with, or proximity to, a hairy insect sets up the motions requisite for attaching the larva to that insect. In a sufficiently large proportion of cases the insect thus clung to is a bee, and by this means this particular structure enables the Sitaris beetle to perpetuate itself. But it can easily be seen that action will be

[1] *I. e.* in the evolving organisms themselves. Whether the whole "plan" of evolution implies a "planning" Mind is a deeper question which I do not raise here. I touch on it below; Part II. ch. 8.

[2] *Cambridge Natural History*, vi. p. 272.

far more efficiently regulated if the inherited structure can make some allowance for the difference of circumstances, if some plasticity, some capacity for modification should arise, and this in point of fact we find when we pass from the mechanical reflexes which we have hitherto considered to the instincts of higher animals.

Instinct is a relatively permanent condition of an animal, which will set it upon a train of actions, and in carrying out these actions, considerable variations may be possible according to the particular circumstances in which the animal finds itself placed. Thus in the springtime it is the instinct of birds to pair, to build nests, to tend their eggs and feed their young. There is no doubt at all on a survey of the whole evidence that the impulse to build nests and, broadly speaking, the method of building them are hereditary. But though hereditary, they are also modifiable. The method of nest-building is varied, the materials used are varied. The old bird builds his nest better than the young one, showing that even here practice makes perfect. The oriole, which usually conceals its nests from snakes and hawks, builds quite openly in villages where these enemies are not to be feared.[1] The orchard oriole builds a shallow nest on stiff branches, but on the slender twigs of the weeping willow builds deep, so that the young are not thrown out by the swaying of the nest. Even in the feeding of the young, cases are recorded in which apparently intelligent adaptation of the ordinary practice through some special circumstances proves to be well within the power of the bird.

As opposed to reflex actions, and as opposed to the popular idea of instinct, the facts show that, particularly as we ascend the animal scale, instincts are not perfect at birth, but are improved by practice. They are not rigid, but are capable of adaptation to varying circumstances; they are not, as it were, planned out by the inherited nature of the individual in all their detail. Yet nevertheless they rest upon a hereditary basis which has grown up under those same conditions which we have already seen laying down and fixing the structure which determines reflex action. It is important here to observe closely what these conditions are. We must bear in mind that

[1] A. R. Wallace, *Natural Selection*, p. 114, etc.

it is not the survival of the individual which, upon the principles laid down by the biologists, will determine the growth of that structure upon which reflex action and instinct alike depend. If we personify Natural Selection, we may say that what it has in view is not the individual but the stock, or if we avoid personification and thereby lengthen our statement, we must say that the conditions which determine the growth and perpetuation of a given structure are not that that structure should preserve the life of each individual in which it exists, but that it should tend to preserve the breed of that individual. In the main these two objects fall into one, since it is only by having its own life preserved for a certain time that an individual can bring young ones into existence; but where they diverge, the young should, according to the logic of the argument, get the preference from natural selection, and so, in point of fact, the act of procreation is in some instances fatal, and throughout the animal world the actions necessary for reproduction are as important and as closely determined by the structure of the individual as the actions necessary for the maintenance of its own life. But on this point a very important difference emerges as we ascend the animal scale. In the lower layers of organic creation, the maintenance of the stock is principally secured by the vast numbers, running up even to millions, of individuals which may spring from a single individual in the course of one season. In the higher ranks of animal life the birth-rate rapidly diminishes. Each individual produces a few, or, in the end, a single young one annually, or perhaps not even annually, and makes up for its infertility by the care which it devotes to the rearing of its more limited family. There is every reason to regard this parental affection, which begins in such elementary methods as the attachment of eggs to a suitable object and proceeds from the very rough nest-building found among a few species of fish and among the lower birds to the high degree of parental affection shown by the most intelligent birds and mammals, as instinctive in character and based upon hereditary impulses. The cat tends its young by instinct just as truly as it hunts mice by instinct, and, broadly speaking, the conditions under which each instinct has arisen are the same. Each fulfils the requirements of race

maintenance and enables the animal to leave behind it progeny like itself.

Precisely the same account may be given of the gregarious tendencies which become more developed and more useful to the species as we ascend the animal scale. Not only the social insects whose case presents peculiar difficulties, but many of the higher birds and mammals live in societies which are much larger than the natural family, and these societies are in a rudimentary way organized, that is to say, the members help one another. They play together, sometimes they hunt together; in a large number of interesting cases they employ sentinels who warn them of danger by an alarm note. "Ibex, marmots and mountain sheep whistle, prairie dogs bark, elephants trumpet, wild geese and swans have a kind of bugle-call, rabbits stamp on the ground, sheep do the same, and wild ducks, as the writer has noticed, utter a very low caution quack to signify the enemy in sight."[1] Here again there is no reason to doubt that the basis of behaviour is instinctive, but the instinct is modified as life proceeds. Strange as it may seem, young animals have no special instinct which bids them follow their own mothers. They will follow any large animal moving as their mothers do. They do not even know by instinct how to suck. A young lamb, for instance, will take whatever comes nearest into its mouth, say, a tuft of wool on its dam's neck, and it is only by degrees, guided perhaps by smell, that it acquires the right method of feeding itself.[2]

4. Thus, though the basis of the family and social life of the higher animals is laid in certain tendencies or characteristics inherited from their forbears, these tendencies do not set down rigid lines of behaviour which are perfect from the outset, but rather supply a kind of basis upon which the experience of the individual itself may operate. This brings us accordingly to a new factor in the regulation of behaviour. When a young chick has emerged from the egg it will peck readily, and on the whole with surprising accuracy, at any small object lying on the ground that catches its eye. Some of the things that it pecks at it will

[1] Cornish, *Animals at Work and Play*, p. 48.
[2] Lloyd Morgan, *Habit and Instinct*, pp. 114, 116.

swallow—yolk of egg, for example, gratifies its cannibal tastes, and having once swallowed a bit of yolk it will peck at another with increased avidity. This pecking we may regard as a reflex and ascribe to an inherited mechanism which is set going by the stimulus administered to the eye by the sight of the object. But if instead of yolk of egg the chick happens to peck at a piece of orange-peel, or at a certain caterpillar which has apparently an unpleasant taste, it will check itself in mid-career, or, if too late to do so, will swallow the object with gestures which we take as signs of disgust, and we have some ground for this interpretation because after a very few experiences—sometimes indeed a single instance—the chick learns to avoid objects of that kind; it continues to peck at the yolk, but rejects the caterpillar. Here, then, a new factor has intervened. The chick started with its hereditary mechanism wound up, as it were, for the purpose of pecking at any small object that it came across, but its own experience has an effect upon this mechanism. It stops its working in relation to certain objects while it permits or even encourages and perfects it in relation to others. On the strength of our human experience we attribute to the chick pleasurable and painful feelings. We assume that the taste of the one object was pleasant and that of the other disgusting. Whether we have a right to draw this inference is a question which need not be argued here. Our main point for the present is that experience modifies an inherited mode of reaction, and it will be convenient to call this experience pleasurable or painful according as it tends to encourage and perfect the reaction, or to discourage and finally put a stop to it. Clearly, the power of thus learning by experience will be of immense advantage to a species in the way of making its behaviour more plastic and adapting it more closely to the requirements of its life. But the utility of this new mode of regulating conduct will depend upon one condition—the feelings of the animal must in the main correspond with the actual requirements of its life. If all the distasteful food were nutritious and all the pleasant food poison, the only result of the operation of experience would be to bring the chick to a premature grave. But the feeling which the chick experiences is as much determined by the inherited structure of its brain and nerve organism as was the original

tendency to peck. This inherited structure has grown up under precisely similar conditions, that is to say, it must upon the balance have assisted the ancestors of the chick in maintaining their stock and not tended to their destruction. What has happened, therefore, is that, in addition to a mere tendency to peck, the chick also inherits the structure which enables it to feel, and to feel in the main in a way that accords with the requirements of its life. The feelings of the individual, then, become the means by which within certain limits the behaviour of that individual is regulated, and thus far greater plasticity is gained for the behaviour itself. The animal which can thus learn by experience can afford to make its mistakes, and the more so as it has the fostering care of a mother to protect it from those mistakes which would be fatal.

Thus the range of adaptation has increased. In place of the direct response coming mechanically, whether well or ill suited to circumstances, in reply to some direct physical stimulus and persisting without variation through the life of the organism, there is room for a variation of behaviour according to the nature of the object with which the animal is brought into contact, as revealed by the experience of previous dealings with similar objects. The result is that a larger class of objects can be dealt with, and behaviour can be adequately adapted to the needs of the organism over a wider field. It is easy to see how this greater adaptability, arising from the power of the animal to utilize its own experiences, will work in with that plasticity of adaptation which we saw in the higher instincts. Instinct is always pressing the animal along the course which will satisfy it. If it can learn by experience what things satisfy and what things do not, it will be so much the better able to choose that course.

Now the kind of experience thus far described does not carry the animal beyond the direct and immediate results of a given reaction. One kind of act gives pleasure and another pain, and these pleasures and pains must, it would seem, be feelings of the agent itself; and though the act is suited to the feeling so as to secure the pleasure or avoid the pain, we cannot yet say that the animal acts with the intelligent purpose of securing the pleasurable or avoiding the painful experience. The full

reasons for this caution need not be given here. It is sufficient to say that this method of learning by experience retains many of the features of a mechanical process, and where an animal can learn so much and no more, we are to regard its behaviour rather as determined by the results of its past experience operating upon its brain structure than by an intelligent apprehension of the future experiences which its action will secure for it. We shall best regard acts of this kind as still within the region of impulse, and as only one step upon the way to behaviour regulated by an idea of what is to happen in the future, and by desire or aversion for that happening. But we should remark that, still within the animal world, the capacity for learning by experience reaches a higher level. The dog, for example, which is scolded or beaten, let us say, for lying with its dirty paws upon a sofa, learns to avoid that sofa in the presence of its master for the future. But, in so doing, the dog will show a somewhat higher grade of intelligence than we find in the chick, for, as we know only too well, it will, if possessed of an ordinary measure of canine obstinacy, avail itself of the sofa if nobody is looking on, and make a hurried descent if it hears somebody coming. There is in this an element of intelligence which, when all the evidence is put together, appears to carry us beyond that simple modification of an inherited method of action which we find in the case of the chick. The dog does not simply avoid the sofa, he does not merely and stupidly associate a sofa with the beating, he continues to like the sofa and to get what he can out of it; he knows that it is some particular person who will punish him, and he may even disregard the presence of those members of the household whom experience has shown him to be less strict. In a word, his action has all the appearance of being intelligently adapted to obtaining one result and avoiding another. He seems to project himself into the future by however short a distance, and to know what will happen to him under certain conditions; and thus, as the result which he achieves appears to be the determining factor in his action, we may admit that action to be definitely purposive. He not merely learns to prefer what is pleasurable in itself, and avoid what is painful in itself, but to do things which experience shows would have pleasurable

results in the future, and avoid things which have painful results. We may say that he desires the one and has aversion for the other, and though it would not be strictly accurate to say that he desires pleasure, it is true to say that he desires what is pleasant and has an aversion for what is painful, and in this sense pleasurable and painful feelings are still the guides, or indirectly the guides, of his action.

But the dog's behaviour is not determined by his own feelings alone. The same intelligence which enables him to make this modest forecast of the future, also endows him with the power to recognize the individuals about him. He knows his master and his mistress; he distinguishes friends and enemies, human or animal, and, as we know, he is ready to fly to the assistance of the one or to the destruction of the other. He has every appearance of entering into the moods, as far as he can appreciate them, of those around him, and if we are sometimes inclined to an uncritical over-estimate of the dog's understanding, still a fair consideration of the whole of the facts leaves no reason to doubt that substantially we are correct in attributing to him knowledge of other individuals, and interest in what they do or suffer.

It is by no accident that the evidence of attachment and affection to other individuals and of attention to the mate and the young in its higher developments, belongs almost exclusively to animals of the grade at which this higher form of intelligence begins to appear. Though the love for the young and the attachment to comrades have instinct for their basis, yet, as we have already seen, that instinct is highly plastic in its methods of effecting its ends, and in that plasticity evidences of intelligence frequently appear. Thus we shall not go wrong in attributing to the higher animals in their simple social life, not only the elementary feelings, the loves and hates, sympathies and jealousies which underlie all forms of society, but also in a rudimentary stage the intelligence which enables those feelings to direct the operations of the animal so as best to gratify them.

5. Thus, when we come to human society we find the basis for a social organization of life already laid in the animal nature

of man. Like others of the higher animals, man is a gregarious beast. His interests lie in his relations to his fellows, in his love for wife and children, in his companionship, possibly in his rivalry and striving with his fellow-men. His loves and hates, his joys and sorrows, his pride, his wrath, his gentleness, his boldness, his timidity—all these permanent qualities, which run through humanity and vary only in degree, belong to his inherited structure. Broadly speaking, they are of the nature of instincts, but instincts which have become highly plastic in their mode of operation, and which need the stimulus of experience to call them forth and give them definite shape.

The mechanical methods of reaction which are so prominent low down in the animal scale fill quite a minor place in human life. The ordinary operations of the body, indeed, go upon their way mechanically enough. In walking or in running, in saving ourselves from a fall, in coughing, sneezing or swallowing, we re-act as mechanically as do the lower animals; but in the distinctly human modes of behaviour, the place taken by the inherited structure is very different. Hunger and thirst no doubt are of the nature of instincts, but the methods of satisfying hunger and thirst are acquired by experience or by teaching. Love and the whole family life have an instinctive basis, that is to say, they rest upon tendencies inherited with the brain and nerve structure; but everything that has to do with the satisfaction of these impulses is determined by the experience of the individual, the laws and customs of the society in which he lives, the woman whom he meets, the accidents of their intercourse, and so forth. Instinct, already plastic and modifiable in the higher animals, becomes in man a basis of character which determines how he will take his experience, but without experience is a mere blank form upon which nothing is yet written.

For example, it is an ingrained tendency of average human nature to be moved by the opinion of our neighbours. This is a powerful motive in conduct, but the kind of conduct to which it will incite clearly depends on the kind of thing that our neighbours approve. In some parts of the world ambition for renown will prompt a man to lie in wait for a woman or child in order to add a fresh skull to his collection. In other

parts he may be urged by similar motives to pursue a science or paint a picture. In all these cases the same hereditary or instinctive element is at work, that quality of character which makes a man respond sensitively to the feelings which others manifest towards him. But the kind of conduct which this sensitiveness may dictate depends wholly on the social environment in which the man finds himself. Similarly it is, as the ordinary phrase quite justly puts it, "in human nature" to stand up for one's rights. A man will strive, that is, to secure that which he has counted on as his due. But as to what he counts upon, as to the actual treatment which he expects under given circumstances, his views are determined by the "custom of the country," by what he sees others insisting on and obtaining, by what has been promised him, and so forth. Even such an emotion as sexual jealousy, which seems deeply rooted in the animal nature, is largely limited in its exercise and determined in the form it takes by custom. A hospitable savage, who will lend his wife to a guest, would kill her for acting in the same way on her own motion. In the one case he exercises his rights of proprietorship; in the other, she transgresses them. It is the maintenance of a claim which jealousy concerns itself with, and the standard determining the claim is the custom of the country.

In human society, then, the conditions regulating conduct are from the first greatly modified. Instinct, becoming vague and more general, has evolved into "character," while intelligence finds itself confronted with customs, to which it has to accommodate conduct. But how does custom arise? Let us first consider what custom is. It is not merely a habit of action; but it implies also a judgment upon action, and a judgment stated in general and impersonal terms. It would seem to imply a bystander or third party. If A hits B, B probably hits back. It is his "habit" so to do. But if C, looking on, pronounces that it was or was not a fair blow, he will probably appeal to the "custom" of the country—the traditional rules of fighting, for instance,—as the ground of his judgment. That is, he will lay down a rule which is general in the sense that it would apply to other individuals under similar conditions, and by it he will, as an impartial third person, appraise the conduct of the contending parties. The formation of such rules, resting

as it does on the power of framing and applying general conceptions, is the prime differentia of human morality from animal behaviour.[1] The fact that they arise and are handed on from generation to generation makes social tradition at once the dominating factor in the regulation of human conduct. Without such rules we can scarcely conceive society to exist, since it is only through the general conformity to custom that men can understand each other, that each can know how the other will act under given circumstances, and without this amount of understanding the reciprocity, which is the vital principle of society, disappears.

6. How custom grows and how it is related to individual character may in a general way be understood by considering how the process goes on amongst ourselves. Consider for a moment the judgments that we pass on our neighbours or on public men, and see how they are formed and how they operate. Many, indeed it is to be feared by far the larger portion, are made parrot fashion by the application of the first rough and ready rule, the simplest and shortest formula that leaps to our lips. We approve and condemn—generally condemn—in the patter of the tram-car or the railway carriage, fitting on modes of judgment that are flying about from mouth to mouth and scarcely obtain a lodgment in the brain. In these cases we are at best accepting and passing on what we find ready made for us by society. But how did it come to be made, since society is after all ourselves and those, not so greatly differing from us, who went before? This points us to a deeper, more original source of the moral judgment, and this, in fact, we find in ourselves in that smaller number of cases in which the subject of

[1] It implies all the growth that is involved in the formation of general rules of conduct as opposed to memories or anticipation of particular events, and on the moral side is the growth of will as opposed to desire, and the formation of objects of permanent interest—relatively stable sources of happiness—as opposed to objects of temporary pleasure. By desire we are to understand impulse informed by the anticipation of an event. By will, a reaction of character to ends in which a relatively stable and permanent satisfaction is found. Its authority over desire we call self-control, but it is rather control by the self as a whole of one or other of the impulses which conflict with its permanent tendency. It is only when this relatively stable and balanced adoption of permanent ends or abiding principles is psychologically possible that the inculcation of general rules could have any meaning.

discussion stirs some impulse within us, touches some spring of our own nature, moves some hidden sympathy or antipathy that dissipates the patter of the street and speaks out for itself. Whenever this happens we ourselves originate a moral judgment, and we do not need to be told that this judgment has its immediate source in some feature of our own character, our sense of justice, our love of our country, our hatred of meanness or cruelty, or whatever it may be. According as one or another of these elements is strong in us, so do we become, as it were, centres from which judgments of one kind or another radiate, from which they pass forth to fill the atmosphere of opinion, and take their place among the influences that mould the judgments of other men. For no sooner has the judgment escaped us—a winged word from our own lips—than it impinges on the judgment similarly flying forth to do its work from our next-door neighbour, and if the subject is an exciting one the air is soon full of the winged forces clashing, deflecting or reinforcing one another as the case may be, and generally settling down towards some preponderating opinion which is society's judgment on the case. But in the course of the conflict many of the original judgments are modified. Discussion, further consideration, above all the mere influence of our neighbour's opinion re-acts on each of us, with a stress, that is proportioned to various mental and moral characteristics of our own, our clearness of vision, our firmness or, perhaps, obstinacy of character, our self-confidence, and so forth. Thus, the controversy will tend to leave its mark, small or great, on those who took part in it. It will tend to modify their modes of judgment, confirming one, perhaps, in his former ways, shaking the confidence of another, opening the eyes of a third. Similarly, it will tend to set a precedent for future judgments. It will affect what men say and think on the next question that turns up. It adds its weight, of one grain it may be, to some force that is turning the scale of opinion and preparing society for some new departure. In any case, we have here in miniature at work every day before our eyes the essential process by which moral judgments arise and grow. Here we have the individual with his spontaneous utterance springing from his own character, guided by what lights he has. Here again we have the clash of judgments so delivered, the

war of ideas, the resultant opinion of society, the consequent re-modelling of their first judgment in individuals, the growth in society of a certain way of looking at things, in short, of a tradition. Individual impulse and social tradition are thus the two poles between which we move.

Deep as are the contrasts between modern society and primitive life, we have no reason to doubt that there too the same forces were at work. The process would be far slower, thought infinitely less mobile, and custom once formed far more set and crystallized. But the prime factors are the same. There is always the character of each individual as it has grown up under the conditions of heredity, with its sympathies and antipathies, its impulses social and selfish, its susceptibilities and feelings in which the relations of human being to human being play so prominent a part, uttering itself in judgments which praise or condemn conduct, forming conceptions of good and bad, right and wrong, as things jump with its feelings or displease them. There is always the influence of the society in which each man is born, the interaction between mind and mind and the shaping of individual opinions into a social standard, the modelling of each new generation by the heavy hand of the past.

7. That the moral standard of man is based on the character of man, though it sounds like a truism, is a principle which has been but little understood in modern ethics. It has generally been assumed that the alternative lay between resolving the moral code into something essentially non-moral, *e.g.* self-interest, or admitting an authoritative mode of judgment, intuitive or rational, the deliverance of which could admit of no further analysis. Even the admission that morality has an instinctive basis might seem to remove it from criticism, in view of the common conception of instinct as universal, infallible, and essentially non-rational. A juster conception of instinct as something which throughout the animal world is found to vary greatly in individuals, to be quite fallible, often imperfect and capable from an early stage of employing elementary reasoning in its service, enables us to see the genesis of morality in a different light. The instinctive element in human morality is by no means an unfailing power implanted by nature in all men to distinguish

right from wrong. It is a name for human character as it grows up under the conditions of heredity, and it is from this character, with all the faults and foibles along with the virtues thereof that the moral judgment issues. Human morality is as blind and imperfect as man himself.

With some writers the view has found favour that sympathy is the basis of morality and of society. There is an element of truth in this, but it is too simple a statement. First, it is not sympathy alone that draws men together. Men have need of each other, physical need, and also a moral need for which sympathy is too simple an expression. Men may be drawn together by hate, by the passions of pride, by the love of competition—by a thousand motives which are far from being purely sympathetic or wholly good. Even love and affection, though at their best they imply sympathy, are not as such the same thing—otherwise passionate love would not so often be selfish. Secondly, if we take the actual as opposed to the ideal codes of mankind pure sympathy is certainly not their sole basis. It is a factor in them. They enjoin mutual support, mutual forbearance, they express in some degree the desire of the impartial on-looker to side with the man who is wronged. Yet in average morality there is a very strong dose of the opposite quality. The work-a-day rules of conduct belong to the morals of strife, of actual warfare it may be, or it may be of peaceful but not less deadly competition. In the mere apportionment of praise and blame the blame is apt to be by far the more interesting part of the matter and the exercise of censorship has made the very name of moralist one to flee from. The rude mind thoroughly enjoyed the time when "the villain had his flogging at the gangway and we cheered." To the more cultivated a moral flagellation is no less acceptable. It is only the highest ethical thought which rises above the categories of praise and blame to the clear-eyed vision of humanity wherein to "judge" men means merely to learn how to deal with them so that they may serve and not mar the common good.

Let us, then, understand that human morality from the first rests on the antagonisms as well as the sympathies, the corruptions and foibles as well as the excellences of human nature. It does not follow that it is a form of selfishness based on the desire for reciprocal benefits. Such a genesis would be out of

keeping not only with the content of morality itself, but with all that we know of the origin of instinct. Reciprocity undoubtedly has a weighty influence in the shaping of conduct. It tends to set the average standard. A upon the whole will be content to do for B what B has done for him, and moreover C will expect as much of A. If he does less he is mean, if more he is generous. In the absence of selfish motives, again, the standard is apt to run down. Men do not become dead to obligation, but they interpret it laxly, and in the absence of criticism give all the doubtful points in their own favour. Where there is no compulsion to give anything, the donor of a penny may swear that he has done more than was required of him. Hence (incidentally) the importance in many matters of public ethics of substituting legal obligation for the good-will of individuals. The best men do their duty already of their own motion. True—but make what they do the law. The result is to raise the whole standard. The worst are worked up to it, the best find still better things to do. All this may prove that selfish considerations sway mankind, but of the doctrine of self-interest as the primary and only genuine human motive, it is sufficient to say that it bears no relation to the facts of human nature, and implies an incorrect view of the origin of instinct.

8. Instinct we saw arose under the conditions of animal life, and is therefore bound in the main to subserve and not to hinder the needs of the living animal. There is an analogous condition limiting, and indirectly shaping, the moral judgment, for if the standard of conduct were so perversely formed as to favour actions tending to the dissolution of the social bond, it would in the end be self-destructive. The society which should habitually favour such conduct would perish by its inherent vices, and thus, as Plato urges, the saying that there must be honour even among thieves expresses a very important truth. But the limit thus imposed is a very elastic one, and this factor by no means works so uniformly for good as might be supposed. To begin with, society's shoulders are broad, and they can bear many a burden imposed by human perversity without breaking down. Many injurious customs may arise and flourish as long as they do not touch the social life in a vital spot. Secondly, the prin-

ciple cuts both ways, as the example of the thieves itself suggests. If the thieves become too honourable they would give up thieving and their particular form of society would break down. This same consideration holds of all class morality. The members of a privileged class must, if they are to remain a privileged class, carefully resist the encroachment of wider conceptions of the public good. They must combat such conceptions not only in principle but in their detailed application. They must extirpate any mode of thought which they find rising among their members in which a dangerous implication may be detected. Or failing to extirpate it they must employ some of those methods of interpretation which long experience has proved useful in drawing the sting out of higher ethical truth. The study of these methods, however, is not our immediate purpose. All we have to remark is that while the requirements of the social union are an underlying condition limiting the movement of the ethical consciousness, these requirements themselves vary according to the nature of each society, and while there are some changes which would destroy society altogether—as *e.g.* if a doctrine of universal celibacy were to prevail—there are others which would merely destroy the existing form of society by transmuting it into something different, perhaps worse, perhaps better. Historically both the fundamental requirements of the social order and the more occasional requirements of a given stage in social evolution have deeply influenced ethical growth. But the influence is for the most part unconscious. Men feel in that dim fashion which is popularly called instinctive that a given change is pregnant with consequences that would deeply affect the social order, and without thinking the matter out, they are prejudiced for or against the change, according as they are dissatisfied or contented with things as they are. The bearings of any new judgment on the general framework of social life must therefore be set down as a most important factor in determining its acceptance or rejection, though the working of this factor may be obscure and indirect, and may indeed be fully accomplished without the deliberate agency of any single individual who has thought the whole matter out.

But, in fact, as human intelligence expands, these underlying conditions of ethical movement are no longer left to work out

their effects slowly and indirectly in the sphere of the unconscious. On the contrary, the requirements of social welfare are deliberately taken into account in dealing with new questions, and even established customs and traditions are criticized in the light of experience. Here emerge some of the broad differences between primitive and more advanced societies.

To Primitive Man custom, as such, is sacred. It is true that it often has some theory to back it. It may be that it was a rule received from the heroes of old, or brought down graven on stone from Sinai, that its violation would, as the Australians hold, produce a variety of bodily ailments, or, as the ancient Babylonians held, expose the offender to the malevolence of witch or demon. But, in reality, the customary is sacred because it is customary, and Sophocles is nearer the true feeling of the ordinary mind when he makes Antigone declare that the moral law is sacred, "because it is not of to-day or yesterday, but lives for ever, and none knows whence it sprang." To the primitive mind—and in all of us there is a good deal of the primitive—it is only the mysterious that is impressive, and custom would lose half its force if its origin and meaning could be rationally explained and logically justified. But thought does not remain permanently at this level. As we follow the ethical movement in its advance, we shall find more and more that the interest shifts from the tradition which men follow half mechanically to the deliberate attempt to re-organize conduct on the basis of some distinct theory of life. A religious movement, a new conception of God or the future life, a philosophical theory of man's place in nature, a fresh analysis of human society, shifts the basis and so affects the standard of conduct. At the same time the converse truth must never be lost sight of. The existing structure of society, the character of physical environment, and the views current in his surroundings of the duties of man, insensibly affect the thought of the profoundest and most original prophet or thinker. Nowhere is the feat of escaping from one's own shadow harder than in the world of ethical and religious thought. Thus in ethics custom and theory are in constant and close interaction, and our subject, the comparative study of ethics, must embrace them both. It would include, were it within one man's power to treat it exhaustively, at the

one extreme the quasi-instinctive judgment based on the unthinking acceptance of tradition, on the other the profoundest theory of the thinker seeking a rational basis of conduct and an intelligible formula to express the end of life, and between these two the influences rational and half rational which are at work with increased assiduity as civilization advances, re-modelling custom and substituting deliberately-accepted principle, whether true, half true, or false, for blind tradition. The one thing common to both extremes and all the intermediate region, is that there are things that men approve and disapprove—conduct, character, purposes, results—that they judge "good" or "bad." The subject of ethics may therefore be defined in the broadest terms as the inquiry into the Conception of the Good, and the business of comparative ethics is to determine the generic character and principal specific variations of this conception as actually held by men in different places at different times. Finally it must inquire whether among these conceptions there is anything that can be called development.

9. Thus the conception of the Good is the central point of ethics, and whatever belongs essentially to this conception we call ethical. Variations in the conception of the good, for instance, we call ethical variations; development in it, if such there be, ethical development. The essential conditions, such as human character, on which the conception depends, are the "ethical" factors in life.

Now the conception of the Good is the logical foundation of every rule of action, that is of the whole standard of conduct. But it is important to observe from the outset, as bearing on the limits of our inquiry, that the standard of conduct may be affected by causes which are not ethical in origin though they may come to have ethical consequences. On one and the same conception of the good, for example, the same conduct may be differently judged, merely because its results were once believed to be good, and are shown by a later experience to be other than was at first supposed. For example, a magical rite may be prescribed as a duty because it is believed to be efficacious in averting a calamity to one's self, one's family, one's society, as the case may be. If the belief in magic disappears,

the performance of the rite will cease to be obligatory, although there may be no change in the current conception of the duties to society, family or self. From this simple example we can understand that rules of conduct are affected by the general level of intelligence and knowledge. The whole character of man's outlook on the world, the degree in which he understands the forces which surround him, will naturally affect his behaviour in many directions. It may be said that this has nothing to do with ethics, but turns on the obvious distinction between means and ends. The end, which is what men really conceive as "good," is the same, only advancing knowledge alters their view as to the means of securing it. But the relationship is in reality far more intricate and subtle than this. Not merely the working rules of behaviour, but the actual conception of what is good or bad is profoundly influenced by the ideas current of man's place in nature and of the forces which surround him, while conversely the conception of the good that he has formed influences man's ideas about the world and the agencies which control it. What the gods ordain comes to be thought right, and so to influence character ; while, again, if men come to see that what the gods have ordained is wrong, their conception of the gods is altered and a religious revolution is brought about. Here even the silence of the ethical consciousness is instructive. If a barbarous practice, such as human sacrifice, is tolerated as a part of religion, the mere fact that the moral sense does not rise in revolt against it is painful evidence of the stunted growth of that side of human nature. But though ethical conceptions thus influence and are influenced by the general condition of knowledge and the conception that man forms of the world in which he lives, we cannot say that ethical, intellectual and religious development are the same thing. Many advances in knowledge may be made without affecting the conception of the good in the smallest degree. Many religious conceptions have no bearing for good or evil upon ethics. It is best to regard these factors of development not as identical but as closely correlated. In particular, ethical and religious evolution are closely intertwined, and we shall have to trace the second in so far as it is essential to the first.

Again, individual conduct may be determined not by a con-

ception of the good but by the compulsion of law. Here there is at first sight another non-ethical influence, controlling behaviour, but here, again, when we look further, we see that the relation is more intimate. Not only are laws founded upon some one's conception of the good (though not always that of the subject who obeys the law), but law in turn affects the conception of the good itself, and as with law so with changes of the social structure generally. Now such social changes take place for the most part without any planning or designing on the part of the society which experiences them. Just as the individual grows with no effort on his own part, and with only a very limited power of regulating his physical development, so society grows, changes, and it may be decays, in ways and from causes of which it is for the most part quite unaware. It is only in the later stages of culture that men begin to study systematically the nature of social forces and the conditions of growth, arrest and decay. No doubt the efforts of the teacher or the statesman to resist glaring evils or develop beneficent tendencies have their effect, and the part played by deliberate reform increases as culture develops. Yet the forces which move society and are ever changing the mutual relations of its members are so vast and so intricate that they still in great measure elude the grasp of the wisest minds, and, as every one knows, the reforms most deliberately planned and most carefully thought out have a hundred unexpected reactions over and above the direct effect which they were designed to produce. Now these slow and silent changes of society are always modifying the ethical standard as expressed in the customs of society. Purely economic changes, for example, will tend to raise one class and depress another. A community in which comparative equality has reigned may give way to one divided between rich and poor, and from such a division some form of class morality is almost certain to arise. That is to say, the difference in social power will be represented by a differentiation in the social code between the behaviour due to a member of the more powerful class and that due to "inferiors." Such causes as the accumulation of capital and the rise of large urban markets have at times made slave labour especially profitable, and slavery has accordingly received a great extension, while the class of free citizens

has declined. In such cases the society affected appears to the on-looker to have undergone a distinct moral deterioration. So perhaps it has, but it is important to observe that the origin of the decline is not moral but economic. The true account of the change in most of these cases is probably that a lowered sense of the value of human life or a degradation of the ideal of citizenship has come about from the rise or extension of slavery, not that slavery has come about from a lowered sense of the value of human life. For what we call practical purposes, which too often mean simply for unscientific purposes, the distinction may seem unimportant. But let us look a little further. We have assumed a case in which the deterioration proceeds unchecked. Suppose, instead, that it awakes a protest, as among the Hebrews the sharpening contrasts of wealth and poverty awoke the prophets. Suppose the protest successful and the deterioration arrested. Here a distinctly ethical ideal, a judgment of right and wrong, an expression of character, has prevailed, and, instead of being passively shaped by the social tendencies, has subdued the social tendencies to itself. How should we account for the difference between this case and the last? We should have to admit that though at the outset both communities held the same standard of social justice, yet they held it after a very different fashion. To one it was a principle, or at any rate was capable, when challenged, of becoming a principle. To the other it was a custom merely, due rather to the favour of circumstances than to the wisdom or moral qualities of the citizens—it was the innocence preserved only through the want of temptation. Thus it is not difficult to see that it may make a great difference, "practical" as well as scientific, whether a good custom owes its existence to social circumstances or to a deliberate acceptance of it as wise and right.

Thus, sociological development is not the same thing as ethical development. Social growth may produce a set of institutions of a certain value which no brain created, no human being planned, and which even those who enjoy them do not sufficiently appreciate to maintain them against attack. This is the element of the unconscious in social life. On the other hand, changes may arise from the growth of character or of a

reasoned conception of the good, and so far they are due to an ethical development. From the ethical point of view institutions depending on a certain degree of ethical advance are of much more value than precisely similar institutions reached by another road, and the difference is likely to emerge in their subsequent history. For as the non-ethical changes of society affect the standard of conduct, so ethical ideas may in their turn re-act upon social organization. Such a re-action has made a large part of the history of the modern world, and analogies can be traced in ancient times, particularly when, as in the instance quoted among the Hebrews, a tenacious tribe adheres, amid the growth of civilization, to the ideals of a simpler life and a primitive social equality. An interaction of this kind is the chemistry out of which come great explosions—social, religious and ethical.

Thus the whole mass of rules and regulations whereby humanity seeks to guide its life is, on the face of it, interesting to the inquirer into comparative ethics. These rules are not all necessarily ethical in origin, nor do all those which are recognized in any given society necessarily express the living character of human beings in that society at the moment. But as showing both what the ethical consciousness has done, and what it has failed to do, they are full of interest and significance for comparative ethics. Social changes proceeding insensibly through the strengthening of forces in one direction, and their weakening in another, affect the moral standard for good or evil. Beliefs concerning the agencies underlying nature's operations supply grounds good or bad for many judgments. These are the main forces which impinge on the conception of the good, shaping and shaped by it in accordance with the degree of intelligence with which it has been formed, and the firmness with which it is held. We shall accordingly have to deal not only with custom and law, but also with the principal forms of social organization on the one hand, and of religious thought upon the other. Only with these before us shall we be in a position to trace the outline of ethical evolution.

10. We have defined our subject as the study of ethical conceptions. It might be suggested that ethics should rather study

the history of conduct itself. Such an inquiry, however, would be as unfruitful as it would be limitless. We may hope with very considerable difficulty to present a fair comparison of the different moral codes that have been accepted at sundry times and divers places. But to attempt to estimate how far the conduct of men has conformed to those codes would be quite another thing. There is no social measuring rod by which we could compare degrees of obedience to law. Civilized societies, with their records of criminal statistics, might indeed repay investigation from this point of view, though there is no department in which statistics are more apt to mislead, and that is saying a good deal. But if we were to take ruder societies into account, the means of investigation would wholly fail. All that we can hope to do in comparing different stages of growth is to deal with recognized customs, accepted maxims, and ideas expressed in mythology, in literature, or in art. In other words, we could only hope to give the history of those ethical conceptions which are recognized as rules of conduct, and we must give up as wholly beyond our power the investigation of the degree in which conduct itself conforms to those rules.

But this is not so much as to say that we are dealing with ideas only, and not with practice at all. In Ethics there are principles and principles, and the distinction between them is often clear enough. A rule of conduct may be a genuine expression of what people actually feel and think, or it may be an ideal bearing as little relation to common practice as the Sermon on the Mount to the code of the Stock Exchange. In other words, there is a difference between the rule to which society expects you to conform and the rule which it keeps for Sunday use only. Both are rules and both may be broken. Hence to record either of them is to record not what conduct always is, but what it is thought it ought to be. But there is this immense difference that one rule has behind it the forces of society, and so becomes in fact the normal conduct of the average man, while the other rests on the teaching of the idealist and is perhaps practised only by the best men in their best moments. This broad distinction we must keep in mind, if we would not immensely over-rate the morals of the civilized world, which, unlike the savage and barbarian world, has almost

invariably a double code, one for use and the other—as a cynic would say—for ornament.

Indeed the modern European has not one or two, but many codes claiming his allegiance—the code of religion, the code of honour, the code of his profession, perhaps the code of his class, and it may be the theories and ideals which he has imbibed from his own favourite teachers. All these codes may, and not infrequently do, conflict. The comparative student has no barometer to measure adequately their relative efficacy. All he can do is to apply his broad test and ask whether they are or are not working codes, *i. e.* rules expressing the average conduct which society expects and enforces, or rules which it is safer to disregard than to deny. But it by no means follows that when he has applied the test he may proceed to leave the highest ideals, "the high which proved too high, the heroic for earth too hard," altogether out of his account. That men have held these views is a fact of great significance for ethical science. It is also a fact of scarcely less significance, that society which cannot practise them is yet forced to do lip-service to them. The historian's point of view is here quite opposed to the cynic's. If indeed we were to look at the conduct of modern society in some relations, and in those relations only, we should be apt to say that it cloaked under fine words actions not less savage than those of our rude and barbarous ancestors. But let us be quite fair to ourselves, and admit that the necessity which we feel for clothing base actions in the language of high principles is after all a proof that those principles have begun to germinate and take root. The Assyrian king surveys with complacency the number of prisoners he has flayed, impaled, or burnt, and takes it all as a proof of the special goodness of Ashur to him and his house. We could hardly do the thing so baldly. The white man has no doubt committed great barbarities upon the savage, but he does not like to speak of them, and when necessity compels a reference he has always something to say of manifest destiny, the advance of civilization, and the duty of shouldering the white man's burden, in which he pays his tribute to a higher ethical conscience. It may be said that the amalgam is a degree more detestable, and that Sargon or Assur-Natsir-Pal had at least the merit of frankness. But this would be historically

false. There was not the smallest merit in the Assyrian king's frankness, because he saw nothing to be ashamed of. The white man's hypocrisy is more revolting in itself, but, historically considered, is a hint of better things. The ethical conception has a certain value in itself, and the fact that it commands even a theoretical allegiance is not without its encouraging side. What men already know to be true will go near to be thought shortly.

Our subject, then, must include the ideal of the apostle as well as the working rule of the lawyer. Its lower limit is the traditional custom followed by the half-unconscious savage. Its upper limit is the philosopher's reasoned and rounded theory of life. Between these extremes all the judgments that men form about conduct fall within its scope. Only we must bear in mind, that there are maxims and laws which state what average men do, and expect others to do, and there are maxims which lay down what, on the basis of some ideal doctrine, they ought to do. Both alike belong to our subject, but of any given law we must know to which class it belongs, and so far as this distinction carries us—but only so far—we are dealing not merely with ethical conceptions but also with the facts of human conduct.

11. So far for the limits of our subject. A word must now be said as to methods. The nature of the evidence at the disposal of the historian of Ethics is fragmentary, and often most unsatisfactory. The difficulty is at its height in relation to primitive and savage tribes. Our object is to deal with ethical evolution, and to do this in fulness, we should naturally desire to have a continuous ethical history of mankind throughout the ages. This of course is not available, and the anthropologist seeks to eke out the gaps in his knowledge of the past by comparison with the present, the assumption being that in the existing savage and barbarous tribes we have survivals of the state of things common to the ancestors of civilized man. How far that assumption holds good it is not possible to say with certainty. It is well to remember that a contemporary savage has been the subject of an evolution neither longer nor shorter than that which our own race has gone through. Although the rate of change has been presumably slower, it is not certain that

there has been no change at all. But without being hypercritical upon this point, and admitting that by comparison between what we know of the contemporary savage and what we know of the ancestors of civilization we get the most probable view attainable of the earlier epochs of mankind, we have still to deplore the fact that our information about the contemporary savage is itself in a fragmentary, obscure, and sometimes contradictory condition. These defects arise in part from difficulties which are readily intelligible in obtaining accurate information from people speaking a foreign language as to modes of life differing greatly from any of those with which the observer is familiar. There are, however, certain special difficulties in the use of the material, arising from the nature of ethical evolution, which deserve mention here.

When we compare very different stages of culture we are apt to find a bewildering mixture of sameness and difference. We find some tribe like the Dyaks of Borneo with whom the traveller tells us it is a delight to dwell, so courteous are they, so hospitable, so full of brotherly kindliness. We begin to think there is truth in the idyllic picture of savage life so popular in the days of our great-grandfathers, until we stumble upon the fact that these same Dyaks are inveterate head-hunters, and make a practice of murdering not men only, but women and children in satisfaction of the duty of blood-vengeance, and to obtain the magic virtues inherent in an enemy's skull.[1] At once the demon picture takes the place of the angel, and the savage world is seen as a Gehenna rather than a Paradise. We forget the inconsistencies of our own civilized codes, and can hardly believe that men capable of acts so fiendish can have any trace of genuine humanity about them. The fairer view about them is that the Dyaks have a morality of their own, for many purposes as good as ours, but limited by the conditions of their life and coloured by their ideas of the supernatural. To be judged fairly, in short, both their virtues and their vices must be taken in connection with their life as a whole. What are at first sight the same ideas, the same institutions, are in reality of different value and

[1] See Ratzel, *History of Mankind*, i. 448.

meaning in different surroundings, and this possible source of error must always be allowed for in drawing comparisons.

In particular we must guard against misunderstandings arising from the obscurity, the inarticulateness, of primitive thought. Ideas quite familiar to us are often unintelligible to the savage, and for the words which we use to express them no precise equivalent can be found in his language, but it is a mistake to infer at once that nothing corresponding to our idea exists in the savage mind. If we look at his actions we may find reason to think differently. He acts as though he had the idea, and yet, it may be, he can give no intelligible account of it. Hence at one moment we are tempted to assert that he holds the idea just as we hold it, at another we begin to deny that he holds it at all. Now this is a difficulty which we find all along the line in the study of mental evolution. It is felt even more acutely in animal psychology. Here we are constantly tempted to believe that an animal is guided by clear ideas, while the evidence when all put together goes to prove that it is moving towards an end without clearly and fully apprehending what that end is. And when we have once grasped the possibility of this pseudo-purposive action, we are tempted to generalize it and deny intelligent purpose in all cases. As in animals, so at a higher remove in man the primitive mind is guided by feelings, by impulses, by necessities, which it can but vaguely understand or formulate. Under their influence it builds up customs which to the inquirer seem logically to imply certain ideas and rules of conduct, but the savage himself when tested fails to understand these ideas. He practises them, yet, to the bewilderment of the observer, he knows not what they are.

This difference between rude and developed thought has an important application to Ethics. For example, statements are sometimes met with that this or that tribe is destitute of any conception of the distinction between right and wrong, and such statements are made by men who by experience should be well qualified to speak. Allegations of this kind arise, I think, from the kind of confusion just mentioned. It may be difficult or impossible to bring a savage to understand the meanings of the terms which we use to express right or wrong, virtue or vice, good or evil. Indeed, if we take highly civilized races at

different periods from our own, we find a certain difficulty in fitting their ethical terms to ours. There is no word in Plato or Aristotle by which we could translate the English term "duty," for instance, but it would be an extremely unfair and unwarranted inference that the Greeks of Plato's or Aristotle's time were destitute of the sense of duty in practice. Aristotle has no word to use corresponding to our term "rights" and the Roman "jura," but he desiderates such a word, showing thereby how far developing thought may outrun language. When we come to the savage we can well understand that even the simplest ethical conceptions may be beyond his power to grasp as ethical conceptions, but it does not follow that he is without a practical sense of right and wrong. In point of fact, although very few generalizations indeed may be hazarded in the whole of our subject, we were, I think, justified in assuming above that no society can maintain itself, unless certain lines of conduct are laid down as binding by prevailing custom. If men are to live together at all they must know what they may expect and what is expected of them under given conditions. The merest game cannot be carried on without some degree of mutual understanding, still less the more complicated business of social life. We shall meet a little later with certain primitive tribes, which are to all appearance wholly destitute of any regularly established means of maintaining order or enforcing penalties. But even in these tribes there is nevertheless a certain body of custom, and something corresponding to what we should call "public opinion" tending to enforce these customs. For example, the sentiment of the neighbours or of the tribe backs a man who avenges a murder and frowns upon a breach of the marriage laws. It is probably true, as a generalization, that there is no existing tribe without some belief in unseen powers, but it is, I think, a more certain generalization that there is no existing tribe without rules of conduct backed by the general approval of the community.

We may, I think, go a step further, and say that, generally speaking, the effect of these rules is to extend a certain measure of protection to what we ourselves regard as the fundamental rights both of person and property, to encourage mutual aid and maintain something of a social life. In these broad outlines

ethical principles do not greatly vary. Indeed the comparative study of Ethics, which is apt in its earlier stages to impress the student with a bewildering sense of the diversity of moral judgments, ends rather by impressing him with a more fundamental and far-reaching uniformity. Through the greatest extent of time and space over which we have records, we find a recurrence of the common features of ordinary morality which, to my mind at least, is not less impressive than the variations which also appear. Some of the earliest funeral inscriptions in existence might well bear comparison with those eulogies which were popular a generation or two ago among ourselves. Thus upon some of the Memphite tombs of the earliest Egyptian dynasties, we find it recorded that the deceased had been "the friend of his father, beloved of his mother, sweet to those who lived with him, gracious to his brethren, loved of his servants, and that he had never sought wrongful quarrel with any man; briefly, that he spoke and did that which was right here below." Let us hope that it was so. At any rate the pious record of the dead man's relations testifies to the virtues which they considered it appropriate to mention.

Again, if from remote but civilized antiquity we pass to contemporary savage races, we find observers praising, sometimes no doubt with undue partiality, those fundamental qualities without which society hardly holds together. Of the North American Indians, for example, so experienced an observer as Catlin was able to write, "It would be untrue, and doing an injustice to the Indians, to say they were in the least behind us in conjugal, in filial, or in paternal affection."[1] Other writers in this case no doubt give less favourable judgments, and we must allow something for individual bias, but when all is said and done, we can hardly deny to any race of men or any period of time the possession of the primary characteristics out of which the most advanced moral code is constructed. Nor is primitive morality merely negative morality. Primitive man is free in giving, ready to share the little he has with his friend and neighbour, while of hospitality he makes a superstition. The duty of charity in the sense of sharing one's goods with others is in no sense pre-eminently a modern or a civilized virtue.

[1] Catlin, i. 121.

Yet with this identity there is a far-reaching difference not only in the actual rules of conduct, but in the way in which those rules are understood and applied, their mental framework, the basis of thought on which they repose. We have spoken of the protection given in primitive custom to rights of person and property. But we must understand that in primitive thought these are not regarded as "rights" in our sense of the term. They do not hold unconditionally, nor is it necessarily "wrong" to violate them. But there are conditions, to our thinking perhaps quite irrelevant conditions, under which they are generally respected, and the neighbours will sympathize with, and perhaps actively support, an injured man who is avenging their violation. Take as an illustration the case of property. In many peoples it is honourable to steal, but not honourable to steal from a guest. We all know the story of "the divine Autolycus" in Homer, who excelled all men in thieving and false swearing, an excellence which, as the bard is careful to relate, was conferred upon him by the special grace of Hermes. But I have no doubt that Autolycus' thieving and false swearing were all in accordance with rule. Probably he observed the oath when duly taken, and cheated under certain prescribed forms which would avert the vengeance of the gods, and it was no doubt his special excellence that he knew those forms to a nicety. He was evidently a man in good repute, and was doubtless honourable to those to whom he considered himself to owe a duty. There are tribes to this day in which the robbing of a guest is prohibited as long as he remains in the house, but if, after speeding him upon his journey, you can catch him up in the field, his belongings are lawfully at your disposal. These instances may serve to illustrate some of the difficulties which confront the student of comparative Ethics. He meets with the familiar ideas of civilized morality in early ethics, but he recognizes them with difficulty; they are the same, yet not the same. The broad explanation is that he is dealing with the unfolding of a germ, and not with an accretion of new elements.

If, that is to say, there is ethical progress (and whether there is such is after all our main question), it is to be found, not in the development of new instincts or impulses of mankind or in

the disappearance of instincts that are old and bad, but rather in the rationalization of the moral code which, as society advances, becomes more clearly thought out and more consistently and comprehensively applied. For as mental evolution advances, the spiritual consciousness deepens, and the ethical order is purged of inconsistencies and extended in scope. The deity, who is at first much less than a man, becomes progressively human and then, in the true sense of the word, superhuman. Blind adherence to custom is modified by an intelligent perception of the welfare of society, and moral obligation is set upon a rational basis. These changes re-act upon the actual contents of the moral law itself, what is just and good in custom being sifted out from what is indifferent or bad, and the purified moral code re-acts in turn on the legislation by which more advanced societies re-model their structure. The psychological equipment of human beings on the one side and the actual needs of social life on the other are the underlying factors determining rules of conduct from the lowest stage upwards, but it is only at the highest grade of reflection that their operation enters fully into consciousness so that the mind can understand the grounds and value of the laws which it has itself laid down. The true meaning of ethical obligations—their bearing on human purposes, their function in social life—only emerges by slow degrees. The on-looker, investigating a primitive custom, can see that moral elements have helped to build it up, so that it embodies something of moral truth. Yet these elements of moral truth were perhaps never present to the minds of those who built it. Instead thereof we are likely to find some obscure reference to magic or to the world of spirits. The custom which we can see perhaps to be excellently devised in the interests of social order or for the promotion of mutual aid is by those who practise it based on some taboo, or preserved from violation from fear of the resentment of somebody's ghost. The ghost or the taboo in that case is in a sense the form which moral obligation takes at a certain stage. It supplies the savage with a theory of the moral basis, an explanation of custom and a sanction. How far it really determines custom, or how far it arises as it were *ex post facto* to justify modes of conduct to which the savage feels himself impelled

without knowing why, are questions of extreme intricacy, and the answer would probably be different in different cases. At this stage it may suffice to remark that in order to understand ethical development, we must not only know what men are bidden to do by law and custom at each stage, but also the reasons which they themselves assign for doing it. We must investigate the basis as well as the standard of morals. It will be convenient to take the standard first, to trace the actual rules of conduct laid down by different peoples at different stages of culture, and proceed from the practice to the theories of conduct. When both aspects of development are before us, we may hope to form a just if an imperfect conception of ethical evolution.

12. If our data are to throw any light on this evolution, it must be through the adoption of some methods of classification distinguishing the more from the less undeveloped ethical conceptions. But here we touch our greatest difficulty. Moral progress (to assume provisionally that it is a reality) does not proceed continuously in a straight line. It does not affect all branches of the moral law simultaneously, nor does it advance step by step with the growth of civilization. Though it may be true that the highest civilization possesses the highest ethical code, it is certainly not true of every intervening stage in the growth of civilization that it witnesses a corresponding moral advance. On the contrary, as has been already hinted, the very conditions of the development of society have in some cases been hostile to moral development for the time being. An advance in the arts of life may well work retrogression in the ethical sphere. Were we to take some of the tests which are often put forward as the special characteristics of civilized morality, we should be surprised to find how often a ruder society comes well out of the comparison when measured against one that is more advanced. Take, for example, the position of women. We are often told that this is a true test of civilized morality, yet in point of fact it would be by no means true to allege that the status of woman varies in all cases directly as the civilization of the society to which she belongs. In the English law of Blackstone's day, for example,

a married woman can scarcely be said to have had a legal personality, so great is the number of her disqualifications as to the holding of property, as to capacity to give evidence, as to the custody of her children, even as to her legal responsibility for crimes; and many of these disqualifications lasted on down to the present generation. If we turn to the oldest code of laws in the world, the recently-discovered laws of Hammurabi, we shall find that few of these disqualifications applied to married women in Babylonia some 2000 years before Christ; yet it would be unfair to infer that the civilization of England in the eighteenth and nineteenth centuries was on the whole inferior to that of Babylonia in the third millennium before Christ. Among many tribes of the lowest savagery, the position of women is relatively good, whereas a step higher in development the family becomes more consolidated, and concurrently the position of the husband becomes supreme, while that of the wife deteriorates into a state little removed from complete slavery. The closer organization of the family, in short, tended for a long while to a deterioration in the legal position of the wife and children. In the same way slavery, the most direct denial of those elementary rights which form the central point of civilized ethics, is an institution which scarcely begins to flourish except with the rudiments of civilization. Below the level of slavery we come to a stage in which the conquering tribe seizes its prisoners, not for the sake of their labour, but for the purposes of commissariat, while even cannibalism itself, which to our ideas may be said to mark the lowest abyss of inhumanity, does not flourish among the lower savages. In some cases it is entirely absent, in others its presence is doubtful. In no case does it reach the development which it achieves as we pass from the lower savagery to the intermediate stage of barbarism.

There is an evolution of evil as well as of good, a veritable fall of man, not accomplished at a stroke by the eating of an apple, but working itself out progressively through the development of forces which bring out what is worst in human nature among the germs of what is better. It would be hardly too much to say that the ethical codes which are most shocking to us, looking back upon the whole progress, are to be found by no means at the beginning of things, but perhaps one-third of the

way up the ladder. I may quote in confirmation the words of the able historian of the indigenous American civilization,—"We follow with a sense of shame and horror man's advance through the middle and higher barbarism to the threshold of civilization, looking back almost with regret to the period of savagery when human progress exhibited a comparatively mild and beneficent aspect."[1]

The study of moral advancement, therefore, is no tracing out of a single straight line, but rather the following of a very winding curve. But even that does not express the full difficulty for the student, for it is no simple or single curve that we have to follow. We have not to deal with one development only, but with many; nor with a uniform evolution, but with a luxuriant diversity; nor even with evolution alone, but with dissolution and decay as well.

How, then, are we to arrange our data? In the first place, we must try to analyze and classify the conceptions or institutions which we find. For example, we can take the multitudinous forms of the marriage tie and we can show that there are certain types about which those various forms group themselves, as though radiating from so many distinct centres. And so with other institutions. There are distinct types by describing which we can mark out the main lines of classification. Actual institutions conform to these types in varying degree, and the gradations when completely filled in form a chain connecting one type with another. This sort of classification is the first step.

Our next task will be to consider whether the types of each institution tend to correspond with any particular stage in the development of social culture. We shall by no means find this an easy matter to determine. It may as well be said at the outset that the cases in which we can say universally that a certain institution belongs to a certain stage of social culture are very rare. On the other hand, we shall find that certain types of institutions do predominate at successive stages, while above and below that stage they grow rarer till they finally disappear. What is meant will perhaps be best explained by an example. The permission of polygamy is a general characteristic of races

[1] E. J. Payne, *History of the New World called America*, ii. 344.

which fall below the standard of European civilization. In such races the custom that allows it is predominant over the custom which forbids it. Yet of such races there are many in which polygamy is rare. There are some in which it is replaced by polyandry. There are not a few which are monogamous. There are some, and these some of the lowest, in which monogamy is as strict and binding as in Catholic Europe. Nevertheless throughout savagery, barbarism and semi-civilization, the permission of polygamy is the ordinary rule, while in the higher civilization monogamy is the rule. In this limited and restricted sense it is true, after all exceptions are allowed for, to say that the tendency of the lower culture is to allow, and of the higher to prohibit, the plurality of wives. We may carry the matter a step further and say that polygamy is the special characteristic of peoples above the lowest and below the highest levels of civilization, for though it occurs among lower savages it is less frequent, and does not reach so extreme a development; and though monogamy occurs within the zone marked out, it is rarer within that zone than elsewhere. Now this predominance of given types of institutions at given levels of general culture has its significance. The forces economic, ethical, social, intellectual, which tend to shape any institution are multitudinous. Some pull in one direction, others the contrary way. In such cases we seldom obtain generalizations which hold without exception. The matter is like any other which comes under the general Law of Probabilities. There are typical cases representing the normal balance of forces, and round these as a centre radiate deviating cases where the ever varying forces have gathered strength in one direction or another. Further, if there is any influence at work which alters the distribution of forces, there may be several such centres corresponding to different degrees in the working out of that influence. This is what we shall find in ethical institutions. At successive stages of general culture certain types predominate without being universal; that is to say, the forces making for a given type are apparently favoured by the general conditions of one stage and depressed by those of another.[1]

[1] Certain difficulties in applying this method should be noticed here. The first is the vagueness of the conception of general culture. It may be

13. In following this method we are deserting the order of time. We are seeking only to classify on a certain basis. Whether the actual advance of society tends to move along the stages which we make to succeed one another in our scheme is a separate question. And there is yet another question which is distinct from all of them. Are we to allow the terms higher or lower in our classification, and if so, on what principles are we to justify them? In relation to the conception of general culture, I fear the terms have already slipped into the text. They are implied when we speak of grades and levels. But it is clear that in applying them without analysis, we run the risk of arguing in a circle. We are so ready to take the ideas of our own time as necessarily the highest, and since these are also the latest—at least there are none later—we may argue that the movement of society has on the whole been towards the best. To avoid intolerable prolixity of description, however, I must be allowed to use the terms provisionally. I shall

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asked whether in the term moral culture is not included, and if so, whether we are not arguing in a circle when we ascribe a certain stage in the one to a corresponding stage in the other. The reply to this objection is (1) that as has already been pointed out, morality does not in point of fact advance step by step with the other aspects of culture, and (2) that though the term needs much further definition, it appears in the ordinary usage of anthropologists to contemplate principally the state of the arts of life, and the degree in which social order (outward order, a very different thing from morality) is maintained. A more serious objection is that no satisfactory method of distinguishing grades of culture has yet been carried through. (See for a brief critique of successive attempts, Steinmetz, *L'Année Sociologique*, vol. iii. 137.) But though the accurate grading of culture leaves much to be desired, broad distinctions (as of uncivilized and civilized, or again of certain types of civilization) are generally admitted, and, for our main argument, only these will be utilized. Steinmetz recognizes the necessity of these classes (*vagues mais justes et très pratiques*, p. 137). He adds the class of Barbarian as intermediate, and the term will be so used in this work, though it must be admitted that the limits of its application are ill defined. Anthropology has still to wait for the completed system of classification which alone can place its generalizations on a firm basis. A further difficulty is that no statistical method exists or can be devised for determining accurately the percentage of cases in which a given institution is found at a certain level. In this respect it is much to be regretted that no systematic attempt has been made to follow the lead of Professor Tylor in his method of Investigating the Development of Institutions (*J. A. I.*, vol. xviii.), but the initial difficulty of determining what is *one* case has proved too great for Anthropology. This difficulty restricts the positive argument from predominance to cases where the exceptions are very rare. In other cases, *i. e.* where "exceptions" are frequent, we must content ourselves with a negative and allow no conclusion to be drawn.

endeavour to justify their use in the course of a final inquiry into the broad trend of ethical evolution. If then these terms are provisionally admitted, our classification will show us the lines of possible evolution from lowest to highest. How far in the order of time societies have moved along these lines, what has furthered, and what so often arrested or even reversed their course are further questions. Whether there is any broad and general tendency in historical evolution giving meaning and value to the long tragedy of human development, is the final and vital question which our investigation of all these points may help us to approach. But it will hardly be possible within the limits of this work to deal fully with those questions of the causation of social change which suggest themselves here. The utmost that we can hope is to determine the question of fact. Has the actual course of human evolution on the whole been from lower to higher, and if so, is this movement based on something permanent in the nature of things, or in the forces which move the human mind? On the answer to this question, in which as it were all the results of science, of morals, of statesmanship, are summed up and weighed in the balance, our whole attitude to life, to social affairs, I would add to ethics and to religion, must very largely depend. It is on the impartial investigation of the facts of mental and moral life that the answer must ultimately rest, and this consideration gives to the most tedious and minute investigation in these fields an inestimable value in the sight of those who determine their attitude to these great issues not by guess work, but by science.

To sum up. Ethical evolution, which is our subject, is not the same thing as Social evolution, but it is intimately connected with it. The strictly ethical element is the conception of the good, whereby man seeks deliberately to regulate his conduct. The modifications of this conception are connected by countless actions and re-actions on the one hand, with the economic and political development of society, and on the other with the development of religion, or more generally, of thought concerning the nature of the world and man's place therein. The object of comparative ethics is to distinguish the main types of ethical conception, and classify them in such wise as to throw the greatest light on the conditions and character of their

development. Among ethical conceptions we distinguish broadly between the rule of action, and the reason given for obeying it. The first is embodied in custom and law, and with these our investigation begins. Our object will be to describe and classify the leading types and customs that we find in each great department of social life. Further, with a view to obtaining what light we can on the general character of human development we shall not only distinguish the various forms which custom assumes, but shall endeavour, as far as possible, to set forth, with due note of exceptions, the type of institution which predominates at each stage of social evolution.

This comparative study of institutions forms the first part of our work. Upon this follows the study of the ideas underlying the social or ethical order, the reasons which men render to themselves for making and obeying laws of conduct. This will draw us to the comparative study of religion, and of the great ethical systems of history. These ideas we shall have to examine and classify in the same manner. From this classification it may in some degree appear how far there is evidence of an advance from lower to higher conceptions, and if so, how far the higher ethical and religious ideas have actually moulded the practice of men. These I take to be the main problems of Comparative Ethics.

Our first business, then, will be with the ethical institutions, that is to say, those customs and laws which are most directly related to ethical ideas. We have to take these institutions under their main heads, and distinguish and classify what we find. Lastly, we have to arrange them in the scale of the general evolution of society. For this latter purpose it will be necessary to form some outline conception of the social framework to which all institutions belong, and in the next chapter I shall therefore attempt to distinguish the main types of social organization.

CHAPTER II

FORMS OF SOCIAL ORGANIZATION

1. When we set out to classify types of social organization the first question that arises is whether any organization at all is a universal characteristic of all races of men. I do not mean to suggest that there ever was or could have been a time in which individuals lived in complete isolation—the relation of mother and child, to go no further, would always involve the rudiments of family organization, and the necessities of defence have always no doubt secured some more extended co-operation. But from this to anything like a regular, permanent, social structure, resting upon any distinct customs and ideas, there is a considerable step; and it is simply a question for history and observation to decide whether there have or have not existed any races of men which have failed to make this primary move in advance. As to this, contemporary, or nearly contemporary, observation has to tell us that there are certain tribes the organization of which is, to say the least, in a very rudimentary condition, and before turning to the somewhat complex structure which will encounter us in dealing with the mass of savage races, it may be well to consider some of these. To do so will guard us against the rash assumption that those institutions which we find generally prevalent among savages are necessarily universal or necessarily primitive. Further, to have on starting an outline picture of what man is in the lowest grade of culture known to us will, I think, assist our comparative judgments all along the line, and I will therefore allow myself a little latitude and give a summary from what our authorities tell us, not only of the social life, but of the ideas and beliefs of a couple of peoples who stand very low in the scale, and of whose life we have clear, consistent, and authoritative accounts.

2. I will take, first, the Rock Veddahs of Ceylon, as described by the Herrn Sarasin.

The Veddahs consist of a mere handful of scattered families living sometimes in trees, in the rainy season often in caves, though they are capable of making primitive huts. They are hunters, and each Veddah, with his wife and family, keeps his hunting ground for the most part scrupulously to himself. These very primitive folk, we read with some surprise, are strictly monogamous, and have the saying that nothing but death parts husband and wife. Infidelity among them is, in fact, rare, and is generally avenged upon the paramour by assassination at the hands of the husband. The looseness of morals which prevails apart from marriage among most savages also appears to be rare among these people; and though the husband is master in his own cave, his wife is well treated and is in no sense a slave. The Veddahs are credited with affection for their children, and the children with attachment to their parents after they have grown up. There is no sufficient evidence of the prevalence of infanticide among them, in which they are also honourably distinguished from many higher savages. The strict monogamy and well-united family life of the Veddahs is partly explained by the fact that they live in great measure in isolation. In the dry season they pass their time on their hunting ground; in the wet season small groups of families will resort to some hillock which is the centre of two or three hunting grounds, and sometimes two or three families will reside together for a time in one cave. This little group of families forms a clan or "warg," but the "warg" appears to be small, and to have but the slightest organization and very few functions. There appears to be a certain common property in the hill on which they meet, and in the honey to be found thereon. Sometimes also the leading men, or it might be an influential old woman, in the clan will intervene to compose disputes. Most clans have only a dim idea of the bare existence of others, and in consequence there is no question of marriage outside the clan which is so common a feature of the next higher stage of development. There is no slavery, of course no class distinctions, and no regular war, though sometimes there will be fighting over the boundaries of hunt-

ing grounds. In short, if we put all these points together, it appears that beyond the narrow circle of the family there is scarcely any organized common life. The family group is isolated. It is, perhaps, in consequence of this fact that marriage with the younger sister is not only tolerated, but apparently common. In all probability, the restriction of the Veddah to a single wife is partly due to the same isolation. A contributory cause is, perhaps, a deficiency in the number of women. In several settlements the Sarasin brothers found 53 adults, composed of 30 males and 23 women. In the caves of the Danigala they found 4 men and 2 women; in other caves 3 and 3, and in yet others 10 and 8. The census of the whole population in 1881 gave 1177 males and 1051 females. When we compare this with many savage tribes in which polygamy prevails we shall find an instructive contrast in the relative numbers of the sexes.

Of the religious conceptions of the Veddah very little is known. The corpse is, or used to be, left where the man died with a stone or sticks put over it. If his death occurred in a cave the family would leave the cave for a season, letting the skeleton remain. No fear, however, is shown of skeletons, and funeral offerings and feasts are only found among the village Veddahs who have come under the influence of the Singalese. There is no evidence of any conception of a Creative God, but there are traces of the universal savage belief in the power of killing men and animals by witchcraft. The most striking and distinctive ceremony is a dance round an arrow, of the nature and meaning of which little seems to be known.

The description which the Sarasins give of the intellectual powers of the Veddahs is not without interest. Their intelligence, they say, is normally developed, but in scope far below that of the European. Their outlook, and therefore the scope of their thought, is extraordinarily limited, but within those limits the Veddah moves with ease. A Veddah untouched by foreign influences, they declare, has no power of counting, and they mention it as something of a feat that one Veddah succeeded in dividing nine potatoes equally between three individuals. They have no names for days or months, but distinguish the full moon. They do not know the year. They express size and

height by gestures. They have no medicine, but have acquired some knowledge of surgery and the binding of wounds from the Singalese. They are contented, and we are not surprised to learn that they combine a certain instinctive fear of strangers with some contempt for them. For the rest, they are said to be irritable and liable to be infuriated by laughter. On the other hand, they have no delight in bloodshed and never kill except as a punishment; they are not cruel even to animals, and are said to appear annoyed at the unnecessary slaughter of an animal. They are truthful, unaggressive, hospitable and sympathetic to strangers in need, grateful, and plucky in fighting. They respect the property even of strangers, and would not even take a few leaves from a banana tree without coming to ask leave. The property of others is to them, our authors say, as a matter of course inviolable.

Such in brief are the character, attainments and social life of the Veddahs, in many respects not what one would have expected of one of the most primitive races of men, almost without social organization but with a strongly-developed family life, far from deficient in the moral qualities upon which higher forms of social life are built up, but wanting in the power or the stimulus, or both, to unite in larger numbers, and in the more complex and far-reaching purposes upon which regular societies are founded. In them among existing savages we perhaps come nearest to the idea of the Homeric Cyclopes, of whom "each rules his wife and children, nor do they care for one another."

3. Not much more highly developed are the Yahgans of Tierra del Fuego, as described by Messrs. Hyades and Deniker. Here the family is less isolated, and perhaps in consequence we have neither the monogamy nor the strict fidelity which are characteristic of the Veddahs. The girl is given in marriage by her parents, as is usual in savage society, without the form of her consent, and though a single wife is the more ordinary rule, two, three, or four are common. Generally the newly-married couple live with the wife's parents, to whom the husband is for the time a servant; and here we have the germ of marriage by service which we shall find a common characteristic of a slightly

higher stage. Apart from marriage there are no restrictions upon either sex, and the enforcement of the marriage tie itself is left to the husband, who may, however, count upon a certain support from the neighbours and kinsfolk in avenging his wrongs. This, indeed, is much the same with all questions of crime. A man who kills his wife will be pursued by her family, or perhaps by a group of families, and killed, it may be a year or two later. No doubt he can resist in fight, but he will obtain no sympathy or support. Justice is entirely a matter which the individual must vindicate for himself. "Every man," say our authors, "is a redresser of wrongs, and does justice for himself, without knowing any law." The quarrels of a few families can scarcely be dignified by the name of wars, and indeed there is an absence of the organization necessary for any operation worthy of that name. There are no chiefs, just as there are no ranks and no slaves.

Our authors deny to the Yahgans any sign of the possession of religion except a belief in ghosts or phantoms, from whom they fear injuries in this life. In particular they are subject to recurring panics due to cannibal ghosts, "oualapatou," who make night attacks upon them and eat men and children. Other injurious spirits are met with in the forests. There are among them sorcerers, "yakamouch," who appear to address incantations to a mysterious being called "Aiäpakal," and to hold from a spirit named "Hoakils" a supernatural power of life and death. The yakamouch narrates that he has eaten some one in a dream, and this bodes ill-luck and even death for the person dreamed of. Some sorcerers, however, act as medicine men, and draw out the causes of the disease from the body in the form of arrow heads.

Like the ancient Hebrews, they "cut themselves for the dead," and the name of the dead man becomes—to use a phrase taken from another part of the world—tabooed. It would not be applied, for example, to any place or person which bears it. The dead man's hut is burnt down, and his effects, such as they are, given away—usages which rather represent fear of death and all that pertains to it than any definite religious belief, though mutilation as a ceremony of mourning may be a survival of a more terrible sacrifice at an earlier stage.

Notwithstanding their superstitious character, cannibalism is not imputed to the Yahgans, and in other respects their moral qualities do not appear to be particularly low. They hold human life sacred with the exception, common among savages, that they allow infanticide. This, however, does not prevent the existence of strong affection for the children who are allowed to survive, or of a similar feeling on the part of the children towards their parents. Property is not held in common, but they are free in giving and hold hospitality a duty. They are neither cruel nor malicious, but they do not regard lying as being in any way disgraceful.

In the Yahgans we have, to sum up, another example of a small number of people—the whole population is less than one thousand—living in small groups of three or four families, without any regular clan organization, though with fairly well established customs to which the feeling of the community lends support, a support which is frequently vindicated by force of arms. The conception of the supernatural among this people is scarcely more definite than their social order, but again shows the germ of beliefs which we shall see reaching a high development at a further stage.

It will be seen that these two peoples differ in several important respects. But they have one thing in common—the very rudimentary character of their social organization. Their communities are small; in the case of the Veddahs there seems to be scarcely any common life beyond that of the family. They have no regular organization for enforcing order or maintaining the customs which they severally follow. Even their beliefs are indefinite; and if some of this indefiniteness may be due to difficulties in the way of understanding them, there is no reason to set it all down to that cause. The one thing that is strongly marked among the Veddahs, their monogamy, seems correlated with the absence of a wider clan life. Now it is for the sake of this elementary, inorganic character that I have dwelt on these people here. Through the greater part of the savage world we find institutions, ideas, an organization in short, which is not ours, but which is nevertheless definite and often complicated. It is perhaps a natural tendency on the part of anthropologists to take the institutions which they find strongly marked in

these low grades of culture and assume them to be primitive,[1] treating the numerous cases in which such institutions are but partially developed as cases of "survival," explaining them, that is, as due to the partial break up of those which they assume to be original. But another alternative is at least equally possible. It may be that in the lowest grade of culture no institution, and no belief—not even that in witchcraft—is very strongly developed; that the elaborate institutions which we find in a great part of the savage world are in their most distinct and characteristic form the products of a special evolution, and that the less distinct, less marked, forms frequently found, which are generally treated as survivals, are to be regarded rather as incomplete developments. This possibility should be borne in mind when we are discussing forms of social organization, and when we find that each type is realized in many different grades of perfection and is often crossed perplexingly enough by tendencies that set towards a quite different type. Bearing this in mind we may now proceed to pass in review the leading generic types of social organization.

4. The deepest distinction between different forms of human society turns on the nature of the social bond itself—the tie which keeps the members of a society together while separating them in a greater or less degree from the rest of the world. Not that the bond of union is ever simple or single. The motives that make men live and act together are diverse. But among the conditions which keep society at one and maintain its constitution in vigour certain leading forces may be distinguished, and at different stages of development one or other of these is often so prominent as to dominate the remainder and give its character to the society as a whole. These forces may, I think, be usefully grouped into three which, we may say, constitute the leading principles of social union. I will call them:—

(A) The principle of *Kinship*.
(B) The principle of *Authority*.
(C) The principle of *Citizenship*.

It might be expected that I should add religion as a fourth,

[1] In particular, it is natural to take institutions which stand in strong contrast to our own, as primitive. This is well pointed out by Steinmetz, *Année Sociologique*, 1898–99, pp. 50–51.

but it is better to say that the religious factor works all along the line, strengthening each of these three in turn with its authority, though there are some cases in which it becomes so dominant as to give a special character to the bond, and these must be noted in their place.

(A) *Kinship*, as a bond of Social Union.

Now primitive and savage society appears to rest generally on kinship. Thus, the one form of social union which may with entire confidence be called natural and universal is the relationship of mother and child. But as the children grow up and form families of their own the old relationship is not necessarily broken. They may remain together, combining for the chase or for mutual defence, so forming themselves into something of the nature of a clan. Or, though wandering away, they may retain memories of kinship and preserve certain common bonds, so forming a tribe. The clan, or group, organization, with generally something of a wider tribal unity, forms the normal society of the primitive world. Let us consider some representative forms of such a social organization.

In Australia a tribe such as the Wakelbura, which is typical of many, occupies exclusively a certain well-defined area. This is divided into lesser areas occupied by divisions of the tribe, and the subdivision may be followed till we come to the local unit consisting of men who are nearly related to one another, along with their wives who are "brought from other localities."[1] This is one way in which the tribe is divided. But there is a cross division dependent upon the marriage customs. The whole tribe is divided into two moieties which are "exogamous" —that is to say, people must marry outside their own moiety. These moieties again are divided into sub-classes, and the sub-classes into totems. The totem is a class of objects, *e.g.* animals or plants, with which certain human beings have a mysterious affinity. The animal has an influence over the human being, the human being can control or affect the procreation of the animal.[2] Among the Wakelbura we find such totem names as

[1] A. W. Howitt, *The Organization of Australian Tribes*, vol. i. part 2, 1888, p. 101.

[2] At least among the Central Australians (Spencer and Gillen, i. ch. 6). I do not know whether this holds of the Wakelbura.

the Plain Turkey, Small Bee, Opossum, Kangaroo, Emu, Carpet Snake, etc. The totems are also exogamous.

Now the moiety and totem divisions go by "mother-right," *i. e.* they are inherited through the mother, and it will be seen to follow that the women and children of any local group belong to different totems and the opposite moieties to their husbands and fathers. For example, a man of the Plain Turkey totem cannot marry a Plain Turkey woman. His wife will be, say, an Emu. Her children, male or female, will also be Emus. Hence any single local group must contain members of the two moieties and of different totems. It follows further that when the men of a group are nearly related and are therefore of one totem, to find wives they must go to another totem, that is to another locality. The moieties and totems will accordingly be scattered among the different local divisions of the tribe. In other words the two kinds of division will cross one another. On the one hand we have the local division corresponding to the actual grouping of men in their daily life. On the other we have a cross division into classes and totems which spread all over the tribe. The magical bond of totemism and the practice of intermarriage connected with it[1] constitute a strand of connection holding the district local groups together.

Considering the social structure as a whole, we find a smaller unit—the local group—based on near kinship and maintained by descent from parent to child, and a wider unity—the tribe—the parts of which are kept in close relationship by intermarriage, the whole structure being permeated by what at a higher stage we should call common religious beliefs, though here the beliefs are really not so much religious as magical.[2] These appear to be the typical elements in early society.

5. But these elements admit of further evolution. The Australian tribe takes its peculiar character from the matrimonial institutions of the peoples which admit of very little develop-

[1] Members of the same totem are also in many tribes bound to mutual defence—not, however, among the Arunta (Spencer and Gillen, i. 211).

[2] Howitt, *op. cit.*, pp. 98–103. With other forms of Australian social organization and the stages of transition to a higher type I need not deal here. See Howitt, *l. c.*, p. 102, and *Tribes of South East Australia*, ch. ii.

ment for the family.[1] In other peoples we find groups corresponding more to our idea of a clan—that is to say, a kind of enlarged family. In the clan most familiar to us where kinship is based on "father-right"—that is, where the child inherits its father's name and status—the government rests on the eldest male ascendant. A man and his wife, their sons with their wives, their grandchildren and great-grandchildren, may dwell together or near at hand, all ruled by the common progenitor. This is the familiar patriarchate of Genesis. But the clan-structure may also be built up on mother-right, in which case the organization is a degree more complex and less compact. Here the centre of the family is the mother, and all her children and daughters' children belong to it. But her husband is not a member of it, neither are her daughters' husbands. They are strangers and sojourners in the abode of their wives, and often have to visit them in secret and avoid all communication with their wives' relatives. This is the form of society known formerly as the matriarchate, but the term was a misnomer, since the cases in which the eldest woman rules are extremely rare, if they exist at all, while mother-right is common. The headship of such a clan is ordinarily inherited through the mother, but not by the mother, passing from her brother to her son and from her son to her daughter's son.

The clan, whether maternal or paternal, has certain characteristic features. Take for example the Malay Suku, the unit of the original Malay Society. Here membership of the Sukus goes by female descent, the headship is partly inherited through the mother but in part elective, and the head dispenses justice except in the grave cases for which an assembly of heads are gathered together. The clan owns all the land which its members occupy. The men who marry into it cannot touch their wives' property without the consent of her family. It protects and avenges its members and is collectively answerable

[1] The relationships are all group relationships, *i. e.* no distinction in name or in tribal custom is drawn between the blood brother and the tribal brother. A group of tribal brothers (a) intermarrying with a group of sisters (b) will have, as children, brothers and sisters of a third group (c). This group relationship clearly does not lend itself to the family structure which hinges on the central position of the common ancestor or eldest male ascendant as representing him.

for their misdeeds. These are ordinary features of clan-life, though naturally they are worked out with many differences of detail.[1]

As to government, for example, there are many variations in the power of the head and the mode of his appointment. He may have absolute powers of life and death like the Roman father, or, to take an example from the domain of mother-right, like the maternal uncle or grandfather among some African people, such as the Barea and Kunama.[2] Or he may have little power to act without the consent of the clan. Thus in the Indian law books his position fluctuates between that of a patriarch and the manager of a joint stock.[3] He may have the right at will to expel his son from the family as apparently in the older Babylonian law, or this right may be expressly limited as in Hammurabi's code.[4] Finally he may himself be set aside for incompetence, as is possible at the present day in the joint family of the Deccan and of Montenegro, and could be done by the Phratry under Athenian law.[5]

Again, the extent of the clan may vary greatly. Under father-right, for example, it may hold together only while the common ancestor lives, or it may continue in being after his death, his eldest son, or next brother, succeeding him, or the succession perhaps being determined by free choice. Some writers distinguish the two forms as the Patriarchal Family and Joint Family

[1] Waitz, *Anthropologie*, 5, i. pp. 139–142.

[2] The theory of Manu, Bk. 8, 416, is that all the property is the father's. Among the Kondhs, too, the father is absolute, the sons having no property, but with their wives and children sharing the common meal. (J. D. Mayne, *A Treatise on Hindu Law*, p. 231; Post, *Grundriss der Ethnologischen Jurisprudenz*, i. p. 136.)

[3] Mayne, 255–298.

[4] I assume in the text, for the sake of argument, that the "Sumerian Laws" do represent actual custom of early date. According to the third of these "laws," the father, by disowning his son, could expel him from house and "wall." (?) The mother could deprive him of the house and its furniture. On the other hand, the son, for disowning his father, could be thrown into chains and sold, and for disowning his mother, he could be driven out of house and town. (Meissner, *Beiträge zum Altbabylonischen Privatrecht*, p. 14.) In *Hammurabi* (sections 168 and 169), the father can only disinherit for a second offence, confirmed by the judgment of a court. In contracts of the period, both the older and newer usages are found. (Kohler and Peiser, *Hammurabi's Gesetz*, p. 134 ff.) If the Sumerian Laws form a real code, they are, as Kohler and Peiser have pointed out, distinctly more archaic than Hammurabi.

[5] Post, *op. cit.*, 1. pp. 137, 138.

respectively, and both are common enough in modern India.[1] There is no necessary limit at which the family must break up, though naturally the disruptive tendencies increase with its size. In India the presumption of the law is that the family is undivided, but this presumption is naturally weaker in proportion as the relationship is more remote. Often, as in parts of the Malay world, among the Nairs of the Malabar coast, and among the North American Indians, a vigorous joint family system grows up on the basis of mother-right. The clan occupies a single Long House in which each constituent family has its own apartments. Among the Iroquois the members of the Long House carried out their harvest in common and had a common store administered by the elder women and distributed by them among the different apartments.[2]

6. But how does the clan grow beyond the family group, and how are we to consider it as linked to other clans so as to form a tribe, a community, or a state? In the first place, there is mere natural growth to consider. If the clan is fruitful and multiplies it will send forth branches which may be partially independent and yet retain a sense of connection with the parent stock. So far common descent is the principle of union. Secondly, as already seen in the case of Australian groups, there are the connections formed by intermarriage. Sometimes these connections serve to bind the smaller family groups into the clan; sometimes, the whole clan being sufficiently held together by the ties of common descent, to bind one clan to another, and so build up a tribe or community. Lastly, the social unity, whatever it be, finds expression and consecration in some form of magic or religion.

It is important to remark that the effects of intermarriage on the social structure differ materially according as mother-right or father-right prevails. Under mother-right the result of marriage outside the clan—"clan exogamy"—is that the man will always belong to a different clan from that of his wife and

[1] Mayne, 223–32. The ruler, after the father's death, may be the eldest male—the eldest brother, "by consent," according to Narada, or he may be chosen, as among the Todas.

[2] Morgan, *Houselife*, pp. 63, 66.

children, who are accordingly more closely dependent on the wife's brother than on her husband.[1] The result is to introduce a cross division, a cleavage that cuts through family and clan life. We have seen this cross division at work among the Australians, but there we thought of it mainly as a bond of union between little groups of low organization. In relation to a more developed system of kinship, however, its other effects become important. The bond that unites separate clans mars the unity of the family itself. This is very apparent where, as among the North American Indians, exogamy is based on Totemism. The members of the totem are bound to mutual defence, and, as the same totem may be found in quite remote parts—as *e. g.* there will be Bears or Beavers all over North America, there is a potential bond of union over a wide district. But equally, since the totem is exogamous, no one totem by itself can form a society. In some cases two totems are, one may say, married collectively, *i. e.* the men of one must take wives only from the women of another. More generally there is no such restriction, but two or more totems live together and intermarry. Thus among the Iroquois there were eight totems—the Wolf, Bear, Beaver, Turtle, Deer, Snipe, Heron and Hawk.[2] All or most of these were found in each of the five "nations" or local communities into which the Iroquois were divided. In each "nation" or local community there would be Beaver men with Bear wives and children, Bear men with Beaver wives and children, the totem bond cutting clean across the family and local divisions.

This dual relationship became a means of achieving a higher political Union. The famous League of the Five Nations was

[1] Thus the uncle (or whatever other relation the particular constitution of the clan may designate) will have the right of protecting or punishing the children, giving the girls in marriage, etc. The children will inherit from him, and in case of divorce, they remain in the mother's clan. (For examples, see Post, i. pp. 72–78.) The uncle may even have the right to protect the child against its own father, *e. g.* among the Barea, Bazen, and Kunama. Cf. Rivers, in *The Cambridge Expedition*, p. 151. In the Torres Straits a fight would be stopped, if one of the combatants saw his mother's brother on the other side. The father also had power to stop a fight, but it was less absolute. (*Ib.*, 144, 145.)

[2] Originally these formed two exogamous groups, *i. e.* Wolf, Bear, Turtle and Beaver could not intermarry, but must take a partner from one of the other four totems. But this restriction broke down. (Morgan, *League of the Iroquois*, p. 83.)

founded on the fact that each nation contained the eight totemic groups enumerated above, and that the totem tie was held as strong as the local tie—so that two Hawks of different nations would have stood together against a Heron or a Bear of their own nation. This cross division formed a natural basis for union, and its strength was attested by the success and durability of the League. What was done consciously by the Iroquois was perhaps done unconsciously at a lower stage, and has probably contributed in large measure to the formation of organized society. The practice of marrying outside the family group would cause many local aggregations of peoples to consist of individuals belonging to two family groups or more, and while the physical tie bound the husband to his wife's children the totemic tie bound both him and them to other families. In this we may perhaps find an explanation both of the wide prevalence of varying rules of exogamy and of the horrors attending its breach. If the structure of any society were bound up with its maintenance it is in accordance with the normal processes of social evolution that a strongly-felt tradition should assist to safeguard the practice and to condemn and destroy those who break it.[1]

Be this as it may, let us note the form of social union arrived at under mother-right and totemism. We have (1) the clan, the enlarged family, living together and connected by ties of descent through the female. (2) The totem cutting across the clans and with the rule of exogamy grafting the sons and brothers of one clan on to another as husbands and fathers. On the basis of this connection we may have (3) the local community of several intermarrying clans living side by side, and (4) a wider tribal union so far as the unity of the totem extends. There is here a possible basis for an extensive but somewhat loose organization, the totem bond tending to weaken rather than to strengthen that of the clan.

Under father-right the development is simpler. So far as exogamy prevails this will still form a bond of connection between separate stocks, but the wife now passes out of her family into that of her husband, and her children are his. Hence the division cutting across the family is no longer to be

[1] On the instinctive element underlying exogamy, see below, chapter iv.

found.[1] Without it the family group is more closely knit. Yet the tie formed by intermarriage, though less strong than under the other system, would still be very real. The wife becomes a member of the family into which she marries, but she still retains relationship with her blood kindred, and cognatio—relationship through either parent—is generally recognized by the side of agnatio, strict male kinship alone.[2] A group of such intermarrying families therefore forms a community united by countless interwoven strands of affinity and blood relationship, while the component units would be more compact than under mother-right.[3]

[1] Among the Australian tribes indeed the totem (or class) divides the family as much under father-right as under mother-right. In either case, one parent is separated from the children. But "father-right" at a stage when the family is so little developed, means much less than the father-right of the clan system.

[2] As *e. g.* among the Celts (Vinogradoff, *Growth of the Manor*, pp. 10–12), and still more strongly among the primitive Germans (*Ib.*, 135, 136).

[3] It is probably owing to the importance of intermarriage as a bond of union in early society that prohibitions of marriage generally extend over a wider circle of relationships in primitive than in advanced peoples (Westermarck, 297 ff.), and that they are often highly developed under the paternal, no less than under the maternal system. Thus, in early Rome, marriage was forbidden within the sixth degree of cognatio ; (Westermarck, 308) in Manu, between all Sapindas, *i.e.* to the seventh degree. Manu further opposes marriage between all relations through the male (Manu iii. section 5. The law is not stated very stringently—a damsel fulfilling these conditions is recommended to twice-born men). The law re-appears in the minor codes. Apastamba, ii. v. 11, 15–16 ; Gautama, iv. 2–5 ; Vasishtha viii. 1, 2 ; Vishnu xxiv. § 9, 10. According to J. D. Mayne, pp. 87, 88, though Manu applies the rule to twice-born men only, it is also observed by the Kurumbas, Meenas, Kondhs of Orissa, and Dravidian tribes of S. India. In China, marriage is forbidden to all of the same name (Alabaster, 177).

Such prohibitions may of course be combined with clan or race or caste endogamy (prohibitions to marry outside the group concerned). The union of exogamy in one relation with endogamy in another leads to much confusion in the discussion of the subject, and obscures the functions and tendencies of each rule. Thus, the suggestion that the clan is built up by exogamy may be countered by the production of endogamous clans. This would be fallacious, since the exogamy which helps to build the clan is the prohibition of marriage between near kin, not that of marriage within the clan itself. But the working of endogamy illustrates by contrast the uniting effects of intermarriage. In the history of Rome, each step towards a wider union seems to have been accompanied by a break-down of endogamous rules. Originally marriage seems to have been limited to the "gens" (Westermarck, quoting Mommsen and Marquardt, 368), or perhaps the "curia" (see Ihering, *Evolution of the Aryan*, p. 334). Then the patrician gentes formed a circle of intermarrying clans. The plebs obtained the *jus connubii* in B.C. 445 (Mommsen, I. p. 297), and henceforward the distinction of patrician and plebeian faded away.

Of course even in early society the principle of kinship is not as rigid in practice as it is in theory. It admits of an element of fiction, since the inclusion of strangers and slaves, which is seldom wholly unknown, makes the community of blood in part at least imaginary. But it is altogether in accordance with primitive ideas that the make-believe—if the belief is properly made with all due rites and conditions fulfilled —is just as good as the reality, and so the adopted son fills the

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Further the Latini Prisci had the *jus connubii* from an early period (Mommsen I. p. 100 ; Girard, 104), and the extension of this form of Latinitas and still more of Roman citizenship, meant at every stage a widening of the circle within which marriage was possible, till it embraced the whole free population of the empire. At each remove endogamy is the separator, intermarriage the bond of union.

The line of thought developed in the text points to the conclusion that it is the combination of the tie of intermarriage with that of descent that forms the basis of primitive society. But to lay this down as our positive conclusion would be to go beyond the evidence. There are rude societies in existence, in which no rule of exogamy holds, so that even the union of parent and child is permitted. (Several instances are given in Westermarck, pp. 290, 291.) On the other hand, Post (*Grundriss*, I. p. 33) justly remarks that close unions are scarcely ever enjoined, unless to preserve the purity of blood (as among the Pharaohs and the Incas), or possibly to preserve the family property. Such reasons imply a society that is already well established, from which the need of intermarriage to maintain the social bond has already fallen away. On the other hand, in a primitive people where the social order was only in the making, it is certainly reasonable to suppose that the objection to marriage between those of the same stock (on whatever principle kinship be reckoned) would tend to keep society together, while a preference for such marriages would tend to break it up.

The difference may be illustrated by contrasting the sociable group life of the Andamanese, a people of exceedingly low culture, who forbid marriage within the known kindred (reckoned moreover on the classificatory principle), and the unsocial life of the Veddahs, where men frequently marry their sisters. The forces binding men together are in reality complex, but if we imagine kinship to be the only one, and then conceive two families living in proximity, first with an exogamous, and then with an endogamous rule, we shall be able to understand the function of exogamy. The two intermarrying families will form in all essentials the nucleus of a community. The two which do not intermarry must remain permanently separate. Each may grow, but if the in-and-in tendency persists, kinship still being assumed to remain the sole basis of union, they will tend constantly to split up, the ties between each section being so much closer than those between more distant kin. Now we cannot say with certainty that some measure of exogamy was essential to the formation of society, for we find societies in which exogamic rules almost wholly fail, and to assume that these are cases of decadence, the normal principle having prevailed in the building of the society, would be to go beyond our evidence. But we can say with some certainty, that exogamy is a principle of union between otherwise distinct groups, just as endogamy tends to cement the group within which it prevails while isolating it from the rest of the world.

place of a real son. But though he is not really bound by the blood tie, the fictions used to constitute him one of the family are an evidence to us showing how strong the sense of the blood tie is. This sense finds its expression in the family worship, the funeral feast to the dead kindred, and the belief that none but the actual kin or those who have with due formality been made such, may lawfully do this service to the dead. Hence the fear of calamities, of troubles from unfed and unpropitiated ghosts, if the family should ever die out. Hence, again, the duty of maintaining the family succession, the intense desire for male descendants, and the community of property out of which the funeral feasts are served. The patriarchal family is in ideal an undying unity. Unencumbered by the cross currents of feeling set in motion by mother-right, it carries the tie of kinship and the affections of the household to their highest development, while it is none the less capable of utilizing intermarriage or the ramifications of descent to extend the bonds of kinship, and so build up a wider union. Thus, as in the case of the Roman *gens*, the clan may be a much wider society than any family group connected by a known common descent. Again, distinct clans may be parts of a still wider, if looser union, bound by a sense of kinship. Thus beyond the Greek *γένος* we have the *φρατρία*, and beyond that the *φῦλον*, each maintaining a certain bond between its members resting on real or supposed kinship.[1]

Accordingly the paternal clan has very naturally formed the starting point for the development of the civilized races, Aryan, Semitic and Mongol, in all of which the earlier Totemism and mother-right have left the merest vestiges, while the paternal clan remains in many cases in full vigour, and in all has left its marks deep in the life of the great nations which have arisen out of it.

To sum up—Early society is based upon the blood tie, real or fictitious. This tie takes the two forms of common descent and intermarriage. Descent may be reckoned through the mother only, or through the father only, or through both parents. Those closely related form groups which keep together for mutual defence and other common purposes, and, when organized

[1] Busolt, *Staats und Rechtsaltertümer*, p. 21 ff.

like an extended family under the eldest male or some one chosen in his place, form a clan. The clan is connected with other clans in part by multiplication which causes subdivision, in part by intermarriage, so as to form a tribal or quasi-national union. Under mother-right the ties formed by intermarriage cross and conflict with those of the family. Under father-right they rather supplement one another. Both forms of society are consecrated by religious or magical beliefs, totemism being specially associated with the maternal clan, and father-right having formed a basis for the strong development of ancestor worship.

7. A primitive group of nomads will have a territory of its own, over which it ranges freely, while jealously guarding the boundaries from infraction by other groups. If advancing in internal order and in the arts of life the people build fixed habitations for themselves, and begin to till the ground and to acquire flocks and herds, they will form a village community.[1] Whether indeed this is the sole origin of the village community is of course another question, and it is again a separate question whether all the institutions, for example, in ancient Germany or in mediæval and modern Europe, which are interpreted by many authorities as pointing to a communal origin, are rightly so interpreted. Into the voluminous controversies surrounding this question we have not to enter. We have only to state in briefest outline what form of social organization the village community constitutes, and how it is related to other forms. This admits of statement in a few words. The village community is a group governing itself in accordance with ancestral custom through its own headman, councils or meetings, and exercising an eminent ownership over the land within its

[1] In so far as membership of the village community is obtained by admission to a share in the common property, and this may be given to strangers, the principle of the blood tie yields in strictness to that of property or neighbourhood. But since adoption is also possible in the clan, we need hardly erect community of property or neighbourhood into a distinct principle of social union, separate from the blood tie. The blood tie gives us a group of intermarrying families which may wander over a tract of land as nomads, or settle down on it as agriculturists. In the latter case, as long as they retain self-government and common property in the land, they form a village community.

borders on a portion of which the village lies.[1] This community may be organized as a clan,[2] and its members related by real or supposed descent from a common stock, or it may consist of a number of family stocks, which, however, we may suppose to be for the most part related by intermarriages. The family rather than the individual is the unit of which such a community is composed,[3] and each family as a rule possesses certain definite rights upon the common property, its own house, its share in the arable land, its rights upon the pasture and the woodland. As to the nature of these shares and the extent to which division is carried, there is every sort of variation. The arable land may be farmed in common and the harvest divided when reaped.[4] More often the arable land is divided into lots which are assigned to separate families, while the waste land and perhaps the meadows after the hay has been got in are at the disposal of the community. The "lots" of the arable land may be periodically changed as in the Russian Mir,[5] in Java,[6] in ancient Peru and in old Japan.[7] In other cases the lots have become hereditary, as generally in the Aryan communes of India,[8] but the cultivation is still subjected to minute rules prescribed by ancient custom. The lot, however, is inalienable, or alienable only with the consent of the community as a whole, which on this point still exercises its rights of eminent ownership. Such alienation may introduce strangers[9] into the community, and these may also be admitted under the common protection.

Lastly the commune, though self-governing, may enter into relation, whether through ties of kinship or alliance, with other communes, and so build up a somewhat larger society. Further it maintains itself with much tenacity under the great empires into which it is often incorporated, and the rulers of which

[1] Cf. Kovalevsky, p. 92. Maine's *Village Communities*, p. 107, etc. Post, i. p. 327, seq.

[2] As apparently the Peruvian Marca. (Post, *l.c.*)

[3] See Post, p. 333.

[4] Instances in de Laveleye, p. 327, and Post, i. 335, 336.

[5] Kovalevsky, pp. 106, 110, etc.

[6] Laveleye, p. 50.

[7] Post, *ib.* 336.

[8] Maine, p. 112.

[9] But in some cases land can only pass to another member of the community (see Post, i. 345). Institutions like the sabbatical year and the later year of Jubilee, by which land passes back to its original owners, are attempts to prevent alienation.

generally find it necessary to make terms with communal institutions and deal with the village through its own headmen or elders. Thus in great regions of the East, while empires have come and gone, the self-governing village has maintained itself, not indeed unchanged,[1] but undestroyed, and has preserved civilization through all the catastrophes of wars, invasions, governmental decay and dynastic change.

Such in briefest outline is the village community, a simple and spontaneous form of social organization, belonging essentially to the earlier stages of agricultural development, flourishing to this day throughout Eastern Europe, civilized Asia and portions of Africa, and forming in all probability an important stage in the development of western civilization.

8. (B) The Principle of *Authority.*

The types of social organization hitherto described may be looked upon as spontaneous growths resting on the natural ties of blood relationship, intermarriage and neighbourhood. By consequence they are suited to small societies. It is true that they widen out into broader organizations; many clans form one tribal union; a number of communes form a district, and perhaps own a common chief. Sometimes even, as in the League of the Iroquois, these unions are the deliberate work of barbarian statesmen, so that something more than mere spontaneous semi-instinctive social forces come into play. But these wider ramifications have as a rule been loosely and feebly connected. The living energy remains with the small, concentrated unit. How, then, are larger aggregations built into compact societies? The most direct method is that of forcible subjection to a single chief or a ruling class. In the primitive tribe the power of the chief is seldom great or even assured. In the commune the headman is little more than a chairman of the folkmoot. But when a people begin a career of conquest two things happen. They themselves must have discipline, and they need a war-chief with unlimited powers. The war-chief surrounds himself with his following, his comites, who attach themselves to his fortunes, and is a simpleton if he

[1] In China, though private property began to come in before the Christian era (Laveleye, p. 454), the commune as a self-governing body is still the most living part of the social order.

cannot make the state of war or the fear of war so permanent that his own absolute authority becomes indefinitely prolonged. On the other hand, captive prisoners form for the first time an important slave class, or perhaps the lands of conquered peoples are left to them to till as serfs under the lordship of favoured individuals from the comitatus of the war-chief. Hence on the one hand the decay of free institutions among the conquerors, and on the other the growth of classes within society. All the great civilizations, those of western Europe, of the far East, of Mexico and Peru, of ancient Egypt and Babylonia, seem to have experienced this stage of development. But it should be noted that the despotic system arises, and in some respects finds its most extreme developments, among people still in the stage of barbarism. For example, in West Africa, as in Dahomey and Ashanti, we find the principle pushed to the point that the king is absolute master of the persons and property of every one of his subjects. He can put any one to death at pleasure, any man may be his slave, any woman taken to his harem. The political exaltation of the monarch is often accentuated by a certain phase in the growth of religious conceptions. He becomes a man-god like the Pharaohs; his person is sacred; no one may look on him and live—finally he becomes taboo and so full of danger to his subjects that he has to be secluded, and the almighty being ends in becoming a helpless puppet in the hands of his priests. Perhaps he becomes responsible for good and evil fortune, for sunshine and rain, and if he manages the weather badly, his absolute power will avail him little and his spirit stands in imminent danger of a compulsory migration to another representative of the royal line. Where religion is too advanced for the actual deification of the king, as in western Europe, he may yet be God's representative, and so, *e. g.* the theory of divine right arose in England when feudalism passed into absolutism and the king who could not be God Himself proclaimed himself at least God's vicegerent.

The personal power of the king, whatever the theory of absolutism may be, is limited by hard facts of human nature; monarchs, whatever their courtier priests may say, are not gods, and therefore can in fact rule in person only as much as they can themselves oversee and understand. Hence personal abso-

lutism is for the most part limited to a narrow circle. A Cæsar or Napoleon may really supervise the affairs of a great empire, but as a general rule the absolute monarchy which I have described has effective existence only over a comparatively small area. A conqueror of a wider territory has after all to divest himself of most of his real authority over it. To retain a nominal supremacy he must parcel it out among his followers, or perhaps leave the native chiefs in possession as tributaries. In either case the ruler of the subject province will probably have much real independence. Where the native prince remains things will go on very much as they did before. The distant great king will be known as one who exacts a tribute, but in no other capacity. Where the king institutes one of his own followers or a great noble of the conquering people as the local Governor, he retains at first a more direct control. But where the territory is large and the means of communication rude, the position of the man on the spot is the stronger. The great officer acquires much practical independence, and often succeeds in making his position hereditary, and a feudal system replaces absolute monarchy.

The conflicts between the two principles of local and central authority make up a large part of political history. At the one extreme the monarch succeeds in governing his people through officials wholly dependent on his favour. At the other he sinks into the position of being merely the first in rank in an order of practically equal and independent nobles. The latter alternative is apt to be the more depressing to the general condition of the people. But in any case the masses find themselves at the base of the social hierarchy which has now arisen to replace the simpler and comparatively equal conditions of the earlier social order. The best they can hope for is to be let alone, and in fact throughout the East the later despotism is merely superimposed on the older organizations which persist beneath its sway comparatively undisturbed, and maintain their vitality while empires rise and fall. Such a state of civilization may, as Egypt, Babylonia and China have shown, persist for thousands of years without essential change in the customs of the people, who in reality take too small a part in the life of the greater community to which they belong to affect

or be gravely affected by its vicissitudes. But naturally the tendency of despotic organization is upon the whole to depress the condition of the masses: in some cases large slave populations are formed; in others a caste system arises; in others the tillers of the soil sink into one or other of the many forms of serfdom, while the conquering race are the lords of the land. All these forms of class subordination should be reckoned as expressions of the despotic principle in social organization; it is not only the form of government but the whole social structure which is infused with this dominating influence.

We are not, of course, to suppose that any society rests upon force undiluted. In the first place, as already remarked, the old forms of organization generally retain a measure of their vitality in spite of conquest. The conquerors themselves are united by ties of blood by the Gentile, the tribal, or the communal bond, they have their own law and customs, resting not on force but upon the deep-lying social principles which have bound them together from of old, and which guide them by some principle of justice, if it be but in the division of the booty. In the second place they find similar institutions flourishing among the conquered and have to make their account with these; but further, and in the third place, both from enlightened self-interest and from the inextinguishable element of self-judgment in man which makes him cling to the semblance of right most of all when he is rejecting the reality, the conqueror cannot bear to rest his title permanently on force alone. He seeks to transmute force into authority. For this he will find a means in religion and an instrument in the priesthood. But at the same time the ethical element has its opportunity, and insists with varying degrees of clearness and emphasis that the real authority of the ruler must be derived from his power to govern for the good of the people. The simple but comprehensive code of despotism merely lays down that one man is divinely appointed to determine what is best for all others, and therewith transmutes arbitrary power into righteous authority and slavish subjection into loyal service.

As to the way in which the duties of a ruler are conceived, we find, of course, every shade of difference in the empires and kingdoms of history. Thus a military tribe of barbarians will

merely raid their neighbours for slaves or for human sacrifice, or they will conquer them for the sake of tribute. But where a more civilized morality prevails, and particularly in so far as conquest ends in an amalgamation of races, and a kingdom comes to be a unity, the ethical principle of the common good asserts itself, and is enforced by religious sanctions. The lord has duties to his serfs, the feudal superior to his vassals, the king to all his subjects. Such duties are by no means peculiar to modern and Christian communities. We find them hardly less prominent in the earliest civilizations. The feudal rulers of Egypt, for example, the princes of the Nomes, always take a special credit for their uprightness as governors, their goodness to the poor, their mercifulness to the weak. A deceased governor under the 12th dynasty asserts that he was "the staff of support to the aged, the foster-father of the children, the counsellor of the unfortunate, the refuge in which those who suffer from the cold in Thebes may warm themselves, the bread of the afflicted which never failed in the city of the South."[1] The Chinese Empire, though in form an absolute despotism, is in ethical principle an empire administered by a divine race for the good of the governed. The duty of the prince to his people is the constant theme of the classical moralists, and their teaching takes tangible shape in the right of freely criticizing the emperor maintained by the censors chosen from the educated class. Thus in the settled and homogeneous kingdom we have a régime in which government originating in force is tempered by moral considerations and evolves into some form of recognized hierarchical authority. The law emanates not from society as a whole, but from its central figure and chief ruler. It expresses not the natural conditions of social life, but the will of the supreme lord, the representative it may be of the deity. Or it is the possession of a priestly caste to whom it has been entrusted by the powers that rule the Universe. The essential point is that law is imposed by the ruler upon the ruled, it is a command from a superior to a subordinate, it is not any longer conceived as a custom arising out of the conditions of life among those who have to conform to it, neither is it a rule of action voluntarily adopted for the common good.

[1] Maspero, *The Dawn of Civilization*, p. 338.

When consolidated by history, by the gradual blending of races, and perhaps by common defence against the foreigner, the kingdom gains some of the characteristics of a free community. Having done so it may, and if it has the opportunity, probably will, start afresh on a career of conquest beyond its borders. If successful, it will build up an empire, and here, again, there will be many gradations in the tempering of force with higher social and moral considerations. Outside their borders the great kingdoms of the ancient East appear to have conquered largely to obtain slaves or tribute, and the principal duty of the local governor was to collect taxes, and forward the produce to the supreme lord at Thebes, Babylon or Nineveh. In the Persian Empire we seem to recognize the beginning of a higher stage. At least its kings interested themselves in the pure administration of justice, and Cambyses flays the corrupt judge and covers the judgment seat with his skin to be a memento and a warning to his successor.[1] The Romans went much further, and developed their conquests into something more nearly resembling a commonwealth by developing local institutions and throwing down barriers between conqueror and conquered. And in proportion as supernatural sanctions have lost strength the modern empire-states have still more distinctly felt the necessity for some other bond than that of naked force or self-constituted authority to link the scattered parts together. Thus the furthest development of the principle of authority points to the necessity for that remaining bond of social union which has yet to be described.

To sum up the results which the despotic principle—whether we regard it as authority resting ultimately on force or as force transmuted into authority—has given us :—

1st.—As to the forms of Society, we have

(a) *The Absolute Monarchy*, where the king is divine and lord without restraint of the persons and properties of his subjects. This form has most vitality in relatively small and barbaric communities.

(b) *The Feudal Monarchy*, suited to wider areas where power is delegated, and the governing class form a hierarchy.

[1] Herodotus, Bk. v. ch. 25.

(c) *The Empire*, formed by the aggregation of kingdoms, overstepping national boundaries and exhibiting very varying degrees of unity and of local freedom.

2nd.—As to the nature of Government, the conception of a moral duty to the governed develops in proportion to the degree of unity achieved, but throughout law is conceived as based upon authority and the social system on the subordination of class to class. For this order a religious sanction is found, generally in the special association of the ruler with the deity, often also in the semi-divine character of the ruling race or caste, or finally in the belief in their conquering and civilizing mission.

If, finally, we may endeavour to sum up in a sentence the function of this principle in human evolution, we may say that it belongs to epochs of expansion in culture and improvements in the arts of life. It is one method by which large communities can be formed with greater facilities for self-preservation and for the maintenance of internal order than the primitive clan or village commune can enjoy. We shall also find that on certain sides the order it imposes is not only more adequate but ethically higher than that attained by the clan. On the other hand, it tends to perpetuate, and in some respects to deepen those distinctions between man and man which, as we shall see, it is a main function of the ethical spirit to overcome. It avoids this error in as far as it embodies or makes room for something of the third principle with which we now have to deal.

9. (C) The Principle of *Citizenship*—Personal Rights and the Common Good.

A paternal government resting ultimately on force, but justifying its position in its own eyes by kindly consideration for the good of its subjects, is not the last word of civilized society. A type of social organization exists in which the relations of government and governed are in a manner inverted. Government is conceived not as itself the source of unquestioned authority, but as a function which certain individuals are delegated to perform as servants, "ministers" of the public as a whole. The structure of the laws, the acts of executive govern-

ment, are not so many commands issued by a superior and obeyed by the people, but are customs and decisions expressing the character and depending on the resolves of the people themselves. The subjects of a government have become citizens of a state, and the citizen has rights which are no less important than his duties. These rights hold good as against the government just as they hold against other individuals, for it is a prime characteristic of the state based on citizenship that it establishes the reign of law, and subjects its own officers to this impersonal sovereign.

On this side, then, the state stands in strong contrast with the despotic empire. Its government rests not so much on the authority of a superior as on the consent of the bulk of its members. Compulsion, of course, is still necessary in the enforcement of law, but its methods are less violent and at the same time more effective. The severity of punishment diminishes, political offences become rarer, and free discussion and criticism are no longer found incompatible with social order. In the societies which have advanced furthest in this direction all classes are admitted finally to a share or a voice in the government. In some respects this description recalls the earlier commune. For there, too, law or custom was the direct expression of the will, or, at any rate, of the character and traditions of the people. It came from them and was not imposed on them. So it is not wholly without reason that reformers struggling with the weight of the bureaucratic machinery under an arbitrary government have looked back on primitive life as an ideal state of liberty and freedom from which civilization was a luckless departure. But this is only a half truth—hardly even so much. There is very little really in common between the "liberty" of the rude commune and that which the law secures to the citizen in a civilized state. For, if on one side the state rests on the general will,[1] on the other side its constitu-

[1] Even under this aspect, the state does not really resemble the primitive community as closely as it appears to do. In the latter, custom has a magical or religious sanction, and in its main lines is unalterable. In the state it is freely modifiable by legislation. Thus in the primitive tribe, though the social structure doubtless rests ultimately on the character of the people, it does not express their free deliberate choice, for this freedom of the general will is not yet a part of their character.

tion is rooted in the personal rights of its citizens. Its component members or units are not groups, but individuals. In the clan and the commune, as will appear more fully in subsequent chapters, the individual has no legal position, scarcely even the possibility of existence, apart from the body to which he belongs. The family, the clan, or the commune, or perhaps all three, are responsible to him for his safety, responsible to others for his wrong-doing, responsible, we may almost say, for his maintenance. His life is laid down by his place in them, his property is in the main a share in their property, his gods are their gods. He cannot leave them, nor can he enter into obligations which will have the effect of binding them. His position in the group is, as it were, an exhaustive account of his existence, and he has little personal life apart from it. In the state all this is greatly changed. The individual is now a responsible agent. As soon as he comes to mature years he stands or falls by himself. He and no one else is punished if he does wrong, and his engagements place no liability on any one except those who are directly or indirectly parties to them. He is free to alienate his property, to enter into contracts with whom he will, to quit his home, and even to emigrate and abandon his allegiance to the state itself. The minor groups to which he belongs are either mere local bodies created afresh by the state which delegates to them some of its rights and duties, or they are voluntary associations which the citizen himself forms by agreement with others, and which fill an ever larger part in public and private life. He even forms his own church and holds his own creed, and his gods need not be those of the state. At the same time, the responsibilities of the old "natural" groups are taken over and are even amplified by the state, which owes its members protection in the exercise of all rights which it recognizes, and, generally speaking, holds itself bound at need to stand between them and sheer starvation. In a word, the state, and particularly the modern state, recognizes the claims of human personality as neither the commune nor the monarchy can afford to do. It exists for a common good, but its function is to maintain private rights.

There lies in this statement, however, a speculative as well

as a practical difficulty, to pause upon which for a moment will help us to understand the nature and development of the state. For if government is circumscribed in its action by the rights of citizens, it would seem that a standard of conduct is being set up which is alien in origin, and may at any time be opposed in practice to the common good. The solution is found by considering in what the common good consists, and what is the foundation of an individual right. The community consists of men and women, who find their happiness in the life which makes the most of their capacities as thinking, feeling, active beings. In other words, the "good" for each man lies in the realization of what is in him, the development of his personality. Now since this is an imperfect world, the growth of one personality may be the cramping of another. But fortunately there is another possibility, since by developing certain sides of ourselves, far from injuring or cramping, we stimulate and assist the similar development of others. Now what form of development is best for the individual is a question of the ultimate basis of morals, as to which we shall have something to say at a later stage. But if we judge from the point of view of the common good, as we are now doing, our choice is clear. We can see that one kind of self-development if attempted by everybody will be eventually destructive, while another kind will harmonize with itself and grow. In this alone is there the possibility of a good for each which is also a good for all—a common good. Calling the basis of this kind of self-development the social personality, we may define the common good as consisting in the development of the social personality, and in its name every member of society has a right to the conditions requisite for such a development, so far as they are generally attainable by social action. On the other hand, no rights exist but those which the common good prescribes. For a right is a claim which one man makes on the actions or forbearance of others, and which is sustained by an impartial judgment. But an impartial judgment is one which looks beyond the individual, and recognizes that the right claimed by one must be maintained for all. But no right could be practically maintained for all which was incompatible with the safety of the community, nor could any right be desirable for all which inflicted net loss on

the community. Hence the rights of each are such as it is for the good of all to maintain.[1]

The generic character of the state, then, is that of a community whose structure and character depend on the good-will of the bulk of its members, and whose welfare rests accordingly on their loyalty and public feeling, while it is for them the source and guarantee of the free exercise of their rights as citizens. Thus the citizen is a fully responsible agent with assignable rights and duties as member of a community. So far as the idea of the community is carried through, *i. e.* so far as the common good really is common to all belonging to it, the rights and duties must fall to all members alike, excepting only as the needs of the common welfare demand a difference. That is to say, privileges of whatever kind must depend on the exercise of functions which they encourage or render possible, and the taking up of such functions must be open to all who are capable of them. Such is the general character, in the baldest statement, of the type of civic community or state, with its two main features, the responsible individual fully seized of civic rights and obligations, and the responsible government expressing the will of the whole society in law and administration. Thus security under law and the power of the community to make and modify the law express the bare essentials of the state.

10. How far the idea of citizenship is pushed is a question of degree on which a great deal turns. The actual number of citizens may be but a fraction of the whole number of people dwelling in a given territory, and while as between these there may be a régime of perfect legality and perfect equality, their relations to the mass of the people may be as frankly based on force as those of any monarchical despotism. Again, within the circle of citizens there may be degrees of civic rights. These differences can only be justified ethically by the belief in an innate and ineradicable difference in capacity to meet civic responsibility on the part of members of different classes. In proportion as this belief is dissolved by experience the obligations

[1] That is, for the good in the long run. There may often be a conflict between expediency and right in the particular case, and hence it is that the opposition arises.

of citizenship become universal, and the idea of citizenship as an exclusive right merges in that of personality, with rights and capacities which all may share simply as human beings. According to this conception, which must be understood from what has been said above of the social personality, what is good in life consists in the bringing out into full bloom of those capacities of each individual which help to maintain the common life. In this development lies a form of happiness for each, which does not conflict, but fits in with and promotes that of others, and does not tend to arrest, but to maintain and carry forward what may be called the growth of the collective mind—the expansion of faculty, the growth of achievement. Every human being in proportion as he is normally developed is able to enter into and contribute to the good life so conceived, and that he should do so is the sum and substance of all his duties to society and all the duties of society to him. But this same principle once pushed through, annuls, ethically speaking, the distinction between citizen and foreigner, for the foreigner may be quite equally capable of the same life, and if so, is morally seized of the same rights and duties, and if, through difference of race, he is not always equally capable, still his rights and duties cannot fall to zero, but vary only with the degree of his incapacity. Hence the fully-developed state in which the principle of personality is rigorously carried through, must also find itself in definite ethical relation to humanity as a whole.

The principles thus summarized are applied with greater or less of thoroughness in the forms of state which under varying conditions and on a very varying scale have come into existence at different periods of history. We find the conception of a government resting on civic rights in the city-state of ancient Greece and Italy and of mediæval Europe; we find it on a larger scale in the country-state of the modern world. The Græco-Italian city was more than a clan, a tribe or a village community; it was an organized political society, with a regular government administering written laws. But the government was not, in relation to the free citizens, in any way despotic; law reigned, not the ruler, and sovereign law was not imposed upon the people from without, but expressed their own traditional character and laid down rules to which they adhered of their

own free choice.[1] The obedience of the Greek to law was a moral obedience, the loyalty of free men to an authority which they recognized as a moral authority. "Though the Lacedæmonians are free," says Demaratus to Xerxes, "yet they are not free in all things, for over them is set Law as a master, whom they fear much more even than thy people fear thee. It is certain at least that they do whatsoever that master commands; and he commands ever the same thing, that is to say, he bids them not flee out of battle from any multitude of men, but stay in their post and win the victory or lose their life."[2]

Thus law in the Greek state expressed not the will of a superior but a moral authority, freely recognized by free men, and equally binding on the ruler and the ruled. On this side the city state was contrasted, as the Greeks were fully conscious, with oriental despotism. On the other hand, in its many-sided development of judicial, executive and legislative organs, it stood far removed from the primitive community. The archaic institutions of early society—the clan, the phratry and the tribe—gradually lost their functions. They ceased to be responsible for their members, and the entire execution of justice passed into the hands of the state. In the most advanced cities new divisions were formed on a territorial basis to replace the old spontaneous associations. The individual was responsible before the law for his own acts, and—at least as far as he was a free citizen—could carve out his own career. He was eligible for the highest office, and Aristotle justly defined the good citizen as the man who could both rule and be ruled with a view to life at its best; indeed, in no other political system have public institutions offered greater scope for individual initiative, nor have collective duties been more generously conceived to meet human needs. Aristotle could define a Greek state as an association for maintaining a good life for its citizens. The

[1] It is an interesting point, as illustrating the transition from the primitive subjection of the popular will to tradition to the later stage of civic freedom, that throughout the best period of Greece the established law retained much of the primitive sanctity attaching to old custom, so that, even at Athens, the Assembly could not finally decide upon changes in the law, but had to refer such innovations to a body selected from the sworn jurymen for the year, while the proposer of a law, held by them to be unjustifiable, was liable to prosecution. (See Sidgwick, *European Polity*, pp. 175, 176.)

[2] Herodt. 7, ch. 104 (Macaulay Tr.).

object of political institutions was frankly declared to be "that we may make the citizens good." Untroubled by any conflict between the secular and the spiritual power, the Greeks could readily conceive a political society as an association for all the principal purposes of life that are not covered by the smaller association of the household. On this side their ideal of the state has never since been equalled.

On the other hand, the idea of association was not pushed through. The state was limited to the narrow circle of the freemen, and even within the freemen the oligarchies drew sharp distinctions. Of the true society which formed the Spartan state, only a few thousand Spartiates were really members; the Perioeci and Helots had nothing to do with the Spartan constitution except to conform to its ordinances. The democracies opened citizenship to a wider circle, but here again the great fissure between freeman and slave was maintained. But so far as the non-free were concerned the distinctive character of the state disappears. The free Athenian demos rules the enslaved mass;[1] the Spartiate rules the Perioecus and the Helot no more by a principle of right than the Great King his motley crowd of subjects. So far as the state includes an unenfranchised population, it abandons the principle of right and falls back on that of force. But this was not the only drawback to the Greek πόλις. Its limited scale and the incapacity of the Greeks for a higher form of union proved the opportunity of Macedon and the destruction of Greek freedom. At Rome the incapacity of the city state to extend its borders and yet maintain the vigour of its free constitution led to the extinction of the Republic; the Empire could only be consolidated by a bureaucracy. The mediæval cities escaped slavery. Indeed as providing a refuge for the fugitive serf they played a part in the movement towards general freedom. But in other respects they repeated many of the features of the Greek πόλις. We find similar conflicts between oligarchic and democratic tendencies. There is the struggle of the crafts as against the merchants, and the counter tendency of the crafts in their turn

[1] It is not, however, always sufficiently recognized that the Athenian democracy did tend to make the position of slaves more tolerable. (See below, chapter vii.)

when once fully enfranchised to become exclusive corporations. There are difficulties with feudal nobles and with king or emperor from which the Greek state was free, and a consequent exaggeration of the troubles of faction and an even greater tendency than in Greece to have resort to the plenary powers of a *tyrannis*. There is the same limitation of area, and the same difficulty of combined action—witness the inertness of the Dutch cities in rendering aid to one another against Philip as compared with the determination shown in the defence of each city individually. Internal faction and external exclusiveness together wrote the doom of the mediæval city.

11. The experiment of founding a state was to be tried over again in the modern world on a larger scale, when the concentration of powers in the hands of the monarch had consolidated the more advanced nations, while personal freedom had on the whole been secured for the mass of the people and the religious schism had undermined the structure of ecclesiastical authority. This concentration meant in the first instance a period of absolutism, and the re-action against absolutism has filled the greater part of the modern period. Ethically considered, this re-action has two sides. On the one hand, the government comes to recognize that its position is only justified by its function in serving public order and the general happiness. The doctrine of the plenary power of the king, emerging though it did readily enough from the feudal conception of the supreme over-lord when the feudal checks were removed, was nevertheless alien to the temper of Europe and the spirit of modern Ethics. The doctrine of the ultimate supremacy of the people and the delegated power of the supreme ruler had held its place in the civil law and had never wholly disappeared from the academic world, and in the eighteenth century the world of thought was fully ready to accept the doctrine that a government holds power only by its capacity to serve the people's needs. On the other side, the principle of personality won the successive recognition of one right after another—right to the protection of the tribunals or immunity from arbitrary punishment, freedom in religious matters, first freedom of conscience, afterwards freedom of expression and of public worship, the right to discuss and criticize

acts of government, the right of meeting and association, ultimately the political right to secure these liberties by an indirect share in the government of the country—all the rights which, taken together, make the modern state what it is.

In so far as it rests on these and similar rights, while they in turn depend on the guarantees which orderly government can give, the modern state depends not on forcible control, but on the assent of the great bulk of the governed. Its principle, needless to say, is not always consistently carried through. In particular, governments have almost everywhere waged war with the spirit of nationality where it has come in their way, and have preferred to wander far from the principles of equal political freedom rather than seek some method of accommodating themselves to an inconvenient but very hardy sentiment. Otherwise there is no such permanent cause of internal division as marred the life of the Greek states. Nor has faction ever shown itself so serious in our world. The larger scale of the modern state gives it more prospect of permanence. But here, again, its ultimate fate must depend on the conduct of its external relations. The internecine feuds which ravaged Hellas have at times repeated themselves on the larger scale of Europe, and threaten now to take in the whole civilized world. And in modern, as in ancient, times military ambitions and internal liberty are hard to reconcile. The future of the State is bound up with Internationalism. If the rivalries and jealousies of the civilized nations can be so far overcome as to admit of combined action in the cause of peace, there is every reason to expect that within each nation the rule of right will be maintained and developed. If, on the contrary, wars are to give way only to periods of armed peace, each country alike must gradually relapse into the rule of a dictatorship. The country state, therefore, can hardly be the final word of politics, but if progress continues it must consist in the quickening into active life of those germs of internationalism which the best statesmen of the nineteenth century helped to bring into a precarious existence.

We have thus distinguished three principles of social union, each tending to work itself out in more than one form of social organization, according to the varying conditions upon which it operates. We have had :—

(1) The Blood Tie, Kinship, and Intermarriage, from which sprang the Clan and the Tribe. Of these there were two great divisions:
  (*a*) The Maternal Clan and its child the Totem.
  (*b*) The Paternal Clan, the Patriarchate.
  In both classes we find the Joint Household, which may be regarded as at once a clan and a family.
  (*c*) The Village Community—the union of intermarrying family groups settled in joint ownership of a piece of land.

(2) Despotism—the Principle of Force and Authority.
  (*a*) Personal—Military or Bureaucratic Despotism.
  (*b*) Feudal Monarchy.
  (*c*) The International Empire.

(3) The Principle of Citizenship, the Common Good and Personal Right, from which spring
  (*a*) The City State.
  (*b*) The National State.

The types of social organization that have been sketched are not mutually exclusive. A despotic oriental monarchy may rule over a hundred thousand village communities, each consisting of a dozen or a score of patriarchal households in which some residual traces of mother-right and totemism may still be found. An independent commune may rest on a clan system founded on mother-right, and such clans may, like the Iroquois, build up a federation resting on assent rather than force, and so correspond rather to a state than to a despotic kingdom. What we have distinguished are (1) certain principles of organization which when they work out unencumbered by other principles form (2) distinguishable types of social structure —types which we may take as landmarks by reference to which we may place other social forms. These types may co-exist as constituent parts of a larger order, or may be blended with one another in various ways. It follows that we cannot say that one of these forms succeeds another in serial order as we ascend the scale of culture. The history of society unfortunately is not so simple. All that we can say with some confidence is that the three principles distinguished and the forms of social union arising out of them preponderate at successive stages in

the order named. That is to say, that the lowest form of social organization tends to fall mainly into the lines of the maternal tribe; that the paternal clan occupies in the main a higher stage and in turn is the natural foundation of the commune, and so on. There is, as it were, a mean point in the scale of social advance belonging to each principle, and though it extends far above and far below we place the principle in the series by referring it to this point.

CHAPTER III

LAW AND JUSTICE

1. To the civilized man it seems the merest truism to say that the business of Government is to make and execute laws, to see that crime is suppressed, and that its subjects are maintained in possession of their just rights. Not only so, but the broad lines upon which justice is administered are to him so familiar and seem so clearly marked out by reason and common sense that if he were to think of their origin at all he would naturally imagine that here, if anywhere, we had to do with simple and elementary moral ideas, implanted in men by nature, and needing no training nor experience to perfect them. Thus, what could be more obvious to begin with than the distinction of civil and criminal justice? A may trespass upon the rights of B, but he may do so without fraud, violence, or any criminal intent. In such cases the loss suffered by B must be made good, but no further punishment should fall upon A. That is, there is ground for a civil action. Or, on the other hand, in injuring B, A may have committed an offence against the social order. In that case he must be punished as a criminal, and is not to escape merely by making good the loss inflicted on B. He has offended society, and society insists on punishing him. But, further, if A is a wrong-doer, it must be proved that he is a responsible agent. He must have done wrong with intention, and, if so, he alone ought to suffer. Socially, no doubt, his fall must affect his innocent wife and children, but this is a regrettable result, not a consequence which the law goes about to inflict. Lastly, whether in a civil or criminal case, the function of the law is to set up an impartial authority, before whom the question is argued. Both sides are heard. Evidence is cited, and witnesses

called, whose testimony the court is free to sift and weigh. Formalities and rules have to be observed, but apart, perhaps, from some which are archaic, they are devised mainly as safeguards against wrongful decisions, and the real business of the inquiry is to get at truth as to the material facts. In the end, the decision being given, the court can freely use the executive power of Government to enforce it.

Elementary as all this sounds, it is, historically speaking, the result of a long evolution. The distinction between civil and criminal law, the principle of strictly individual responsibility, the distinction between the intentional and the unintentional, the conception of the court as an impartial authority to try the merits of the case, the exclusive reliance on evidence and testimony, the preference of material to formal rectitude, the execution of the court's decision by a public force—all are matters very imperfectly understood by primitive peoples, and their definite establishment is the result of a slow historical process. Perhaps no other department of comparative ethics gives so vivid an idea of the difficulty which humanity has found in establishing the simple elements of a just social order.

2. The growth of law and justice is pretty closely connected in its several stages with the forms of social organization that have been described. In quite the lowest races there is, as we have seen, scarcely anything that is strictly to be called the administration of justice. Private wrongs are revenged by private individuals, and any one whom they can get to help them. The neighbours interfere in the least possible degree, and how far a man's family, or the wider group to which he belongs, will stand by him, is a question which is decided in each particular case as its own merits, or the inclinations of those concerned, direct.[1] But even at a very low stage this uncertain and fitful action

[1] See the account of the Veddahs and Fuegians above, ch. ii. pp. 43–48. With these may be joined the Andamanese, who live in small communities numbering from twenty to fifty individuals, and have no distinct institutions for the maintenance of order or the settlement of disputes. Each group, indeed, has a chief, but his powers are extremely limited, extending to little beyond the right of calling the people together and exercising over them what influence he can. There is no form of covenant, no oath, no form of trial, no ordeal. Justice is left altogether to the aggrieved party, who shoots an arrow at his enemy or throws a burning faggot at him, the

begins to take a more definite shape. We find something that corresponds roughly to our own administration of justice, and from the outset we find it in two broadly distinct cases. There are occasions upon which a whole community will turn upon an offender and expel him, or put him to death. Sometimes, indeed, this is merely a kind of lynch law directed against a man who makes himself unbearable, or commits some crime which touches a general feeling of resentment into life. But beyond this there are at almost, if not quite, the lowest stages certain actions which are resented as involving the community as a whole in misfortune and danger. These include, besides actual treason, conduct which brings upon the people the wrath of God, or of certain spirits, or which violates some mighty and mysterious taboo. The actions most frequently regarded in this light are certain breaches of the marriage laws and witchcraft.[1]

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neighbours playing their part in the matter by running away until the quarrel is over, which at any rate prevents the spread of the mischief. The law of vengeance is not developed. A relative may avenge the death of a murdered man, but it is not necessary that anything should happen. The neighbours are afraid of the murderer, and he finds it desirable to absent himself for a while. Not uncommonly a man will show his resentment, not by punishing the wrong-doer, but by destroying all the property that he can lay hands upon, including his own. The chief's property alone will be respected. In other words, the Andaman Islander, like the Malay, is apt to run amok, and such men are not resisted because they are held to be possessed. Conjugal fidelity among this monogamous people is enforced by the husband, but in punishing the guilty party he runs the risk of retaliation. There appears, however, says Mr. Man, to be an understanding that the greater the provocation offered, the less is the risk incurred by the injured person or his friends, in avenging the wrong—a sentiment which very aptly characterizes the degree in which justice is recognized as a public matter at this stage of social development. There is no definite redress, but an injured man may hope to carry the support of the neighbours with him in rough proportion to the strength of his case. Injuries done by a member of another tribe lead to more regular feuds and are avenged if possible by a night attack upon the neighbouring camp, which, if successful, results in the slaughter of the males and the destruction or appropriation of the property of the vanquished. The women of the enemy, it may be noted, are not deliberately killed ; at any rate their death is not, as among some more advanced peoples, a matter for boasting ; and the child captive would be treated kindly with a view to its adoption by the captors' tribe. Cannibalism, the frequent concomitant of savage warfare, is held in horror, but is attributed by the southern Andamanese to the inhabitants of the northern island. (E. H. Man, *Journal of the Anthropological Institute*, vol. xii. 108, seq.)

[1] Cf. Steinmetz, *Ethnologische Studien zur ersten Entwickelung der Strafe*, i. pp. 328–341).

The breaches of the marriage law which come in question here are confined to those transgressions of the prohibitions of intermarriage, upon which primitive races lay such extraordinary stress. A mere violation of the marriage tie is generally in savage society a private matter, avenged by the husband alone, or by those whose duty it is to help him; but a breach of the rules of exogamy, a marriage within the *totem*, for example, or a marriage outside the permissible class, is regarded as an offence endangering the community herself, and only to be wiped out by the extinction of the offender. A Central Australian tribe, for instance, which has no regular means of enforcing any law, will make up a war party to spear the man and woman who have married in defiance of these customs.[1] Similarly common action will often be taken to protect the community from witchcraft, obviously a terrible offence in a society which firmly believes in it. Among the North American Indians a public sentence was often pronounced and carried out by the chiefs in cases of sorcery, and sometimes also in cases of cowardice or breaches of the marriage customs.[2] The punishment of witchcraft is as widespread as the fear of it, and, prompted as it is by the sense of a danger to the whole community, is often peculiarly ferocious, and directed to the destruction of every one connected with the offender.[3]

The object of the community in exterminating the criminal is not so much to punish the wicked man as to protect itself from a danger, or purge itself from a curse. Achan takes the accursed thing, the thing which had been devoted to Jahveh. The taboo on the thing devoted is at once communicated to Achan himself as though it were a poison or an infection, or, to take another metaphor, a charge of electricity. It passes from the spoil appropriated to the appropriator, and no resource remains but to devote Achan with all his family and belongings, everything,

[1] Sometimes the old men of the tribe will invite a neighbouring group to execute the criminal. Cutting and burning are sometimes substitutes for death. (Spencer and Gillen, *Native Tribes of Central Australia*, p. 495.)

[2] Kohler, *Zeitschrift für vergleichende Rechtswissenschaft*, 1897, pp. 412–416. For the punishment of sorcery, see Waitz, iii. p. 128.

[3] "The punishments affecting sorcerers can scarcely be called punishments. They are acts of annihilation."—Post, ii. p. 395, where numerous instances are given from all parts of the world. In some cases, the whole family of the offender perishes with him.

in fact, which the accursed thing had infected. The Roman criminal, if his offence bore a religious character, was "sacer"—separated from men, made over to the offended deities.[1] His goods were set apart (*consecratio bonorum*), for they were involved in his impurity. He was banished, so that none might come into contact with his accursed person. He was cut off from fire and water, not primarily because fire and water were necessary to his life, so that he was sentenced to death by being deprived of them, but rather for fear that his accursed touch should pollute the sacred elements and convey the pollution to others. That the criminal suffered in consequence was a satisfactory collateral effect, but the main thing was to secure the fire and water from pollution.[2]

Thus far, then, public punishments, where they are any more than an explosion of indignant feeling, may be regarded as public action taken for the sake of public safety. The community is threatened with palpable treason, or with occult magic influence, or by the wrath of the gods.[3] It protects itself by destroying the traitor, or sacrificing, or, at any rate, getting rid of, the witch. It is a kind of public hygiene rather than a dispensation of justice which is in question.

3. With the redress of wrongs, the maintenance of private rights, and the punishment of the bulk of ordinary offences, it is different. For these purposes primitive society has no adequate

[1] Thus the undutiful son is "sacred" to the parental deities. "Si parentem puer verberit, ast olle plorassit, puer divis parentum sacer esto." (Bruns, *Fontes Juris Romani Antiqui*, p. 14.) Treason to a client, or ploughing up a neighbour's landmark would also render a man "sacer." Cf. the curses in Deut. xxvii. At bottom the idea of some North American Indians is similar, among whom the murderer is taboo, because haunted by the ghost of the victim. (Kohler, *Z. f. vgl. Rechtswst.*, 1897, p. 408.)

[2] Ihering, *Geist des Römischen Rechts*, i. pp. 275–277, etc.

[3] Among the German tribes the worst offenders were sacrificed to the gods, unless the latter showed signs of grace, in which case the offender became a slave of the gods, or was sold into slavery, or became an exile. The great offences were:—breach of the peace of the temple, the army, or the meeting, of a special festival, or finally of the house; grave-robbing, treason, raising an army in rebellion, arson, black magic; anti-social crimes of peculiar depravity, such as breach of a sworn peace, unnatural desire, and acts of cowardice, such as desertion from the army; concealed murder and theft, in opposition to open murder and robbery. (Schröder, *Lehrbuch der Deutschen Rechtsgeschichte*, pp. 74 and 76.)

organization. Administration of justice in this sense is in the main a private matter. It is for the sufferer to obtain redress or to revenge himself, and in the lowest stages of all the vengeance is, as we have seen, casual, arbitrary and unsystematized. But as the family and the clan acquire definite and coherent structure a systematic method of redress grows up. The leading characteristics of this method are two—(1) that redress is obtained by retaliation, and (2) that owing to the solidarity of the family the sufferer will find support in obtaining the redress that he seeks. The individual man, woman or child no longer stands by himself or herself, but can count with considerable certainty on the protection of his relatives, who are bound to avenge a wrong done to him, or to stand by him in exacting vengeance by every tie of honour and religion. In other words, this is the stage of the blood feud. "He that sheddeth man's blood, by man shall his blood be shed," is the earliest law given in the Old Testament, and on this point the Old Testament may be said to be a faithful reflection of the historical facts.

Though the blood feud is an expression of vengeance, this vengeance is by no means wholly without regulations and rules of its own. There is a rough justice recognizable in its working, though it is not the justice of an impartial third person surveying the facts as a whole. There is no question of a just judge rendering each man his due, but rather of a united kin sympathizing with the resentment of an injured relation when expressing itself in certain traditional forms. Justice as we understand it—the rendering to each man his due as judged by an impartial authority—is not distinctly conceived as a social duty in primitive ethics, and that is what, morally speaking, differentiates the primitive ethical consciousness from the ethical consciousness at a higher stage of development. Yet primitive ethics works upon rules in which a certain measure of justice is embodied. Thus in the first place custom prescribes certain rules of retaliation which are recognized as right and proper and have the approval of the neighbours and clansmen. The simplest and earliest of these rules is the famous *Lex Talionis*, "An eye for an eye, and a tooth for a tooth," familiar to us from the chapter of Exodus, but far earlier than Exodus in its first formulation. We find it, like many other primitive rules of law, in the recently-discovered

code of King Hammurabi,[1] which is earlier than the Book of the Covenant perhaps by 1300 years, and we find it at the present day among people sociologically at an earlier stage of development than the Babylonians of the third millennium before Christ. We find it applicable to bodily injuries,[2] to breaches of the marriage law,[3] and perhaps we may say in the rules of the twofold restitution for theft and in the symbolic form of mutilating the offending member even to the case of offences against property.[4] In some cases the idea of exact retaliation is carried out with the utmost literalness—a grotesque literalness sometimes, as when a man who has killed another by falling on him from a tree is himself put to death by exactly the same method—a relation of the deceased solemnly mounting the tree and, much one would say at his own risk, descending upon the offender.[5] More often, of course, vengeance is simpler. Stripes, mutilation or death are inflicted without any attempt to imitate the original offence, though there may very well be a grading of the vengeance in proportion to the original wrong. The homicide is slain, the adulterer speared, beaten, or mutilated, the thief slain, enslaved or forced to make restitution, the defaulting debtor enslaved or flogged.[6]

[1] Hammurabi, § 195. If a man has struck his father, his hands one shall cut off.

196. If a man has caused the loss of a gentleman's eye, his eye one shall cause to be lost.

197. If he has shattered a gentleman's limb, one shall shatter his limb.

200. If a man has made the tooth of a man that is his equal to fall out, one shall make his tooth fall out, etc.

[2] See instances in Post, ii. pp. 240, 241.

[3] The adulterer has to yield his own wife to the injured husband (*loc. cit.*, cf. Waitz, iv. 361).

[4] The thief loses eye or hand. Similarly the adulterer or ravisher may be castrated—and with this we may perhaps compare the punishment of the unchaste wife by prostitution. The perjurer loses his tongue or the "schwurfinger." (Post, *l.c.*)

[5] In the *Leges Henrici*, Pollock and Maitland, vol. ii. pp. 470, 471. Mutilation is punished by retaliation among the Barea and Kunama, the Whydah, Bogos, and Congo people. (Post ii. 241.)

[6] *E. g.* among the Cherokees the defaulting debtor was tied to a tree and flogged. (Waitz, iii. p. 131.) In other tribes disputes as to money matters were regulated by arbitrators chosen by the conflicting parties. Those who were prevented by illness or any real obstacle from paying their debts, were not compelled to do so, but those who could pay and did not fell into general contempt.

4. But at a fairly early stage in the growth of social order a fresh principle is introduced tending to mitigate the blood feud and so maintain peace and harmony. For the special vice of the system of retaliation is that it provides no machinery for bringing the quarrel to an end. If one of the Bear totem is killed by a Hawk, the Hawk must be killed by one of the Bears, but it by no means follows that this will end the matter, for the Hawks may now stand by their murdered clansmen and take the life of a second Bear in revenge, and so the game goes on, and we have a true course of vendetta. Accordingly peaceable souls with a view to the welfare of both families, perhaps with the broader view of happiness and harmony within the community, intervene with a suggestion of peace. Let the injured Bears take compensation in another form, let them take cattle or other things to make good the loss of the pair of hands which served them. In a word, let the payment of damages be a salve to vindictive feelings. In that way the incident may come to an end and peace will reign. When such a practice becomes a customary institution we enter upon the stage of composition for offences, a stage peculiarly characteristic of the settling down of barbarous tribes into a peaceable and relatively civilized state, and especially of the growth of the power of a chief whose influence is often exerted to enforce the expedient of composition upon a reluctant and revengeful family. As the institution takes shape a regular tariff is introduced, so much for an injury, so much for the loss of an eye, so much for a life. Often a distinction between classes of crime appears. For some it is the rule that composition should be accepted. Others are recognized as too grave to be washed out except by blood. Thus among the German tribes murder and rape excited blood revenge, while other injuries were punishable by fine, and the fine is significantly called "faida," as being the feud commuted for money.[1] The distinction lasted into the Middle Ages, even in a period when the fine or a part of it went to the king. Our *Leges Henrici* still distinguish emendable offences, in which sacrilege and wilful homicide without treachery are included, from unemendable offences such as housebreaking, arson, open theft, aggravated homicide, treason

[1] Waitz, *Deutsche Verfassungsgeschichte*, i. p. 437, who, however, denies that the fine was a merely buying off of revenge.

against one's lord and breach of the church's or the king's peace.[1] These are crimes which in the Anglo-Saxon term had no bôt—no bôt or money payment atoned for them—they were bôt-less, boot-less. Even when the bôt was payable it stood at first at the discretion of the injured family to accept or reject it, and we find the Germanic codes in the early Middle Ages setting themselves to insist on its acceptance as a means of keeping the peace.[2] If the fine is not forthcoming of course the feud holds.

But when injuries are being assessed, not only must there be a distinction between the injuries themselves, but also between the persons injured. There must be a distinction of rank, age, sex; a free-born man is worth more than a slave, a grown-up person than a child, generally speaking a man than a woman, a chief or person of rank than a free man. And so we have the system of "wergilds" familiar to us in the early stages of our own history,[3] and again recognizable in the code of Hammurabi.[4]

[1] Post, *Afrikanische Jurisprudenz*, ii. 30, gives a list of ten African peoples in which composition is allowed for all offences. In three others it is allowed for all cases except the gravest, such as murder; among the Kimbundas, for all except sorcery and treason; among the Barolong for all except rebellion, and among the Kaffirs for all except treason, sorcery, and sometimes murder. In mediæval England there was much local variation in the fines. At Lewes the fine for bloodshed was 7/4, for adultery 8/4, the man paying the King, the woman the Archbishop. In Shropshire the fine for bloodshed was 40/-. In Worcestershire rape was not emendable. (Pollock and Maitland, ii. p. 457.)

[2] Charlemagne's capitulary of 802 forbids the kin to increase the evil by refusing peace to the manslayer who craves it. (Jenks, *Law and Politics*, p. 102.) In England, down to the ninth and tenth centuries, the aggressor might elect to bear the blood feud, but by an ordinance of Alfred, the injured party might have the help of the ealdorman to enforce payment. (Pollock and Maitland, i. 47.)

[3] Among the Germanic peoples, in the early mediæval period, the wergild of a noble was generally double that of a free man. A post in the King's service trebled the wergild of the official's hereditary rank. The Liti (Hörige) had as a rule half the wer of free men, whilst slaves according to strict principle had none, but only a valuation. In fact, however, some barbarian codes assigned them half the wer of a litus. (Schröder, pp. 345, 346.)

[4] Hammurabi illustrates two subsidiary points. (1) An offence against a man of higher rank may be unemendable (*i.e.* punished by retaliation), while the same offence against a man of lower rank is commutable. (2) The rank of the aggressor may influence the punishment as well as that of the sufferer. Injuries to eye or limb of a "gentleman" are punished by retaliation (sections 196, 197), but in section 198, 'If he has caused a poor man to lose his eye or shattered a poor man's limb, he shall pay one mina of silver." Further, by section 199, the slave has no wer—for the same injury

In one form or another the system of composition prevails or has prevailed almost to this day over a great part of the barbaric world, among the North American Indians,[1] in the Malay Archipelago,[2] in New Guinea, among the Indian hill tribes, among the Calmucks and Kirghis of the steppes of Asia,

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the aggressor "shall pay half his price." Similarly for the loss of a tooth (sections 200, 201). The provisions for assault and homicide are as follows:

202. If a man has struck the strength of a man who is great above him, he shall be struck in the assembly with sixty strokes of a cow-hide whip.

203. If a man of gentle birth has struck the strength of a man of gentle birth, who is like himself, he shall pay one mina of silver.

204. If a poor man has struck the strength of a poor man, he shall pay ten shekels of silver.

205. If a gentleman's servant has struck the strength of a free man, one shall cut off his ear.

206. If a man has struck a man in a quarrel, and has caused him a wound, that man shall swear, "I do not strike him knowing," and shall answer for the doctor.

207. If he has died of his blows, he shall swear, and if he be of gentle birth he shall pay half a mina of silver.

208. If he be the son of a poor man, he shall pay one-third of a mina of silver.

209. If a man has struck a gentleman's daughter and caused her to drop what is in her womb, he shall pay ten shekels of silver for what was in her womb.

210. If that woman has died, one shall put to death his daughter.

211. If the daughter of a poor man through his blows he has caused to drop that which is in her womb, he shall pay five shekels of silver.

212. If that woman has died, he shall pay half a mina of silver.

213. If he has struck a gentleman's maidservant and caused her to drop that which is in her womb, he shall pay two shekels of silver.

214. If that maidservant has died, he shall pay one-third of a mina of silver.

218. If the doctor has treated a gentleman for a severe wound with a lancet of bronze and has caused that gentleman to die, or has opened an abscess of the eye for a gentleman with the bronze lancet and has caused the loss of the gentleman's eye, one shall cut off his hands.

219. If a doctor has treated the severe wound of a slave of a poor man with a bronze lancet and has caused his death, he shall render slave for slave.

220. If he has opened his abscess with a bronze lancet and has made him lose his eye, he shall pay money, half his price.

[1] Kohler, *Zeitschrift für vergl. Rechtswissenschaft*, 1897, pp. 406, 407; Alvord in *Schoolcraft*, v. 653; Morgan, *League of the Iroquois*, 331, 332. (Failing a present of a belt of white wampum the family of the deceased appointed an avenger.)

[2] Waitz, v., p. i. 143. The wergild varies from 200 to 1000 gulden, according to the rank of the dead man. In case of poison, the poisoner becomes the slave of the family. A paramour may be enslaved by the husband if taken in the act, but if the matter is brought before a court, money compensation must be accepted.

among the rude tribes of the Caucasus, the Bedouins of the Arabian desert, the Somali of East Africa, the negroes of the West Coast, the Congo folk of the interior, the Kaffirs and Basutos of the South.[1]

5. Primitive vengeance, then, may be exacted by retaliation or compounded by money payments. In either method a rough justice is embodied, but it is justice enforced by the strong hand. Even graver differences separating barbaric vengeance from civilized justice have now to be mentioned. These differences are inherent in the nature of the social organization upon which the blood feud rests. For the blood feud is retribution exercised by a family upon a family; it rests upon the support which each individual can count upon from his own immediate relations, possibly from his whole clan; it rests, in a word, upon the solidarity of the kindred. But the effect of this solidarity upon the working of retributive justice is by no means wholly favourable. In the first place it has the effect that the lives of members of other clans are held indifferent. A perfect illustration is afforded by the Ungani Nagas, a tribe of the North-East frontier of India who live in villages composed of two or more "khels," as their clans are called, which, though living side by side and intermarrying,[2] are for purposes of defence independent communities. A hostile tribe may descend upon the village and massacre all the members of one "khel" while the other "khels" sleep peacefully in their beds and do not raise hand or foot to protect their neighbours. This is cold-blooded, but it is not without a certain reason. The exterminated "khel" has incurred a feud from which the others are free. If they rise in its defence they not only incur the danger of the present fight, but they also involve themselves in the permanent feud.[3] Next, in so far as justice rests on the blood feud, and the blood feud is of the nature of a private war between distinct families or clans, it follows that public justice will not deal with offences committed within the family. These do not excite the blood feud. In

[1] Post, ii. pp. 256, 257.

[2] The khel is exogamous.

[3] Godden, *J. A. I.*, xxvi. p. 167. Similarly in contemporary Africa, so far as blood revenge holds, the slaying of any one outside the clan is no more regarded as wrong than the killing of an enemy in battle among us. (Post, *Afrikanische Jurisprudenz*, i. 60.)

some cases no fixed punishment appears to be assigned for them, but this may happen not only because they do not belong to the province of public custom, but also, perhaps, because they are too rare for any definite custom to have arisen for dealing with them. Like parricide among the Romans, they represent the absolute ultimate of human wickedness. Further, generally speaking, there is no need for any recognizable general rule, because offences within the family are dealt with by the arbitrary justice of the paterfamilias or of the kin collectively, who, even if other means of enforcing authority failed, have always the ready remedy of outlawry, which puts the offender at the mercy of the firstcomer.[1] Outlawry from the clan is the most effective of all weapons, because in primitive society the exclusion of a man from his kinsfolk means that he is delivered over to the firstcomer absolutely without protection. An illustration may be drawn from the early history of Mahommed's teaching, when the Korâis, who found that Mahommed's gospel was very inimical to their gains, wanted above all things to put him out of the way and made the most strenuous efforts to induce Mahommed's uncle, who was head of the clan, to disown him. Had the uncle consented, Mahommed would have been left without protection and might have been dispatched by any one without fear of consequences, but till the death of the uncle the clan stood by him; and the leading men of Mecca, powerful as they were, were not bold enough to take upon themselves a blood feud with Mahommed's family.[2] The fear of the blood feud is the great restraint upon disorder in primitive society, and conversely he whose death will excite no blood feud has no legal protection.

[1] Among African peoples there is, generally speaking, no blood feud for homicide within the clan. But among the South-Western Arabs the parricide is put to death, and for fratricide the father may put the offender to death or demand the blood price. (Post, *A. J.*, i. 63.) Among the Bogos the slayer of brother or father would be killed on the spot if taken. But if he escapes, his fate will depend on the question whether his victim has or has not left children. If so they will take up the feud. If not he can make his peace without payment, and then inherit his brother's property and widow. (*Ib.*, ii. 60.) In the Malay region the murder of a relative is dishonouring, but has no money penalty. (Waitz, v. i. 149.) For illustrations of the variety of customs under this head, see Steinmetz ii. 153–176.

[2] Palmer, *Introduction to the Koran*, pp. 24, 25.

So far the negative side of clan justice. The positive side has peculiarities not less startling to the modern mind, for since it is a member of one body who has done a wrong to a member of another body, the whole body to which the offending member belongs is held responsible by the whole body to which the injured member belongs; and it is not merely the original criminal who may be punished, but logically any member of his family may serve as a substitute. Responsibility is collective, and therefore also vicarious. Sometimes the whole family of the offender is destroyed with him.[1] Sometimes any relation of the offender may suffer for him vicariously. John, who has done the deed, being out of reach, primitive vengeance is quite satisfied with the life of Thomas, his son, or brother, or cousin. Just as in the blindness of warfare the treacherous act of an enemy is generalized and perhaps avenged in the next battle by a retaliation which does not stay to ask whether it is falling on the innocent or the guilty, so in the primitive blood feud. The wrong done is the act of the family or clan to which the aggressor belongs, and may be avenged on any member of that family or clan.[2] Sometimes the retaliation is made more specific

[1] *E. g.* among the Kaffirs, at Loango, and among the Barolong, the relatives are held responsible for payment by the accusers, and on the Gold Coast the relatives of the sorcerer are slain or enslaved along with him. (Post, *A. J.*, i. 46.) Among the North American Indians the family and the whole tribe were held responsible for a murder committed by one of them. (Waitz, iii. 132.) In Anglo-Saxon law it was possible for a family to be enslaved for a theft by the father. (Pollock and Maitland, i. 56.)

[2] For instances, see Post, *Grundriss*, i. 230 ff. Professor Tylor instances the Bedouins, Australians, South Sea Islanders, and Kaffirs, as peoples among whom the blood feud involved the whole clan. (*Contemp. Review*, 1873, p. 59.) In some cases the wergild involved the slaying of several persons for one. Thus by Anglo-Saxon law, six ceorls must die for one thegn. (Pollock and Maitland, ii. 450.) Edmund set himself to suppress feuds, forbidding attacks on the kindred unless they harbour the homicide. Mahometan law, while admitting retaliation, restricts it to the offender. (Post, *loc. cit.*) But the kin are liable for money composition. (Dareste, p. 64.) In many African tribes a creditor will seize and sell as a slave any relation of the debtor's whom he can find, or even any member of the same town. It is not surprising to learn that this method of distraint is a fruitful source of war. (Post, *A. J.*, ii. 140.) A still wilder development of vicarious revenge is found in the Gazelle Peninsula among the Papuas, where the husband whose wife has been stolen, goes into the bush and kills the first man he meets. This man's kindred do the same thing, and the process is repeated till the stroke lights upon the original offender, whose goods have to pay all the damage. (Kohler, *Z. d. vgl. Rechtsw.*, 1900, p. 381.) Cf. a similar practice in S. Guinea. (Post, *A. J.*, ii. 22.)

by a fresh application of the *Lex Talionis*, and to the rule "eye for eye," there is the pendant "son for son, daughter for daughter, slave for slave, ox for ox." You have slain my son? Then the true and just retribution is that I should slay yours.[1] It is my daughter who is slain? Then it is with your daughter that you must pay for her. Sometimes vengeance is specially directed against the chief as representing the clan. Sometimes it may be visited on any male, or even on any adult member of the clan, children alone being excluded. Sometimes this last shred of humanity is torn away. The principle is pushed to its furthest and most revolting development among the head-hunting tribes common in South-East Asia, in which magical ideas combine with those of revenge, and the skull of the enemy has a potency of its own which makes its possession desirable in itself. The head of a child or woman of the hostile body is no less coveted an object than that of the fighting warrior, and is probably easier to obtain. When the principle of composition arises collective responsibility is reduced, by a less barbarous logic, to a common pecuniary liability. The clan are collectively responsible for the blood money due from a member, and by the same logic they are the collective recipients of blood money due to any member.[2] And as with blood money so with other debts.[3] There is a collective liability—a conception which in this softened form has its uses in the social order, and is in fact enforced and applied

[1] The most astonishing case is in the treatment of the builder in the code of Hammurabi, 229 :—"If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death.

230. If he has caused the son of the owner of the house to die, one shall put to death the son of that builder.

231. If he has caused the slave of the owner of the house to die, he shall give slave for slave to the owner of the house." Though barbaric, these sections might have a use if suitably posted in modern suburbs.

[2] *E. g.* among the Bogos and Bedouins (Post, i. 253), and compare Post, *A. J.*, i. 45 and ii. 35. For collective claims on the blood money, cf. Tacitus, *Germania* (ap. G. Waitz, *Deutsche Verfassungsgeschichte*, i. 32), "recipitque satisfactionem universa domus."

[3] *E. g.* at Great Bassam. (Post, *A. J.*, i. 45.) Among the Yoruba, Tshi, and Ewe speaking peoples, collective responsibility which formerly applied generally is now restricted to debts. (Ellis, *Yoruba-speaking Peoples*, 299.) Cf. Waitz, iv. 306.—In Yucatan the whole family is responsible for debt.

to the commune—though in right it belongs rather to the clan —by many Oriental Governments.[1]

6. Further, with the theory of collective responsibility goes almost necessarily the failure to distinguish between accident and design. In primitive society the real gravamen of a charge against an aggressor is that he has done an injury. How he did the injury, whether of set purpose or by accident, is a matter of less moment. My son, or brother, or cousin, or clansman, is killed; that is enough for me; I must have some satisfaction out of the man who did it, and, what is more, my family must have some satisfaction out of his family. Furthermore, the whole distinction between design and accident is by no means so clear to primitive man as it is to us, for though it needs little reflection and a very moderate amount of self-knowledge to distinguish between what one has done one's self by accident or by design, and a very moderate degree of reasoning power to apply the distinction to other men—still, the nascent reflection of the savage is strangled at birth by the prevailing theory of witchcraft and possession. If a tree falls upon a man's head the savage holds that a spirit guided it. If a man, cutting a branch from a tree, dropped his axe on to another's head, it may not have been the man's own soul which guided the axe, but it was another soul which possessed him temporarily; he was possessed by some spirit, and as possessed he should be put out of the way.[2] The treatment of the subject in the Hebrew codes illustrates the difficulty which is experienced even at a higher stage in strictly distinguishing between the two spheres of design and accident. Each code assigns a city of refuge for the excusable homicide, but none make it perfectly clear whether it is unintentional or unpremeditated man-slaying that is in view. The Book of the Covenant simply says, "If a man lie not in wait, but God deliver him (the victim) into his hand,

[1] And elsewhere; *e.g.* at Sierra Leone and in several other parts of Africa, responsibility for debt extends to the Commune. (Post, *A. J.*, i. 75.) In the Malay constitution the family is responsible for its members, the *suku* (clan) for its families, the village for its *sukus*, the district for its villages. (Waitz, v., i. 141.)

[2] Post, *A. J.*, ii. 29. In West Equatoria the man who injures another in cutting down a tree is held the agent of an indwelling magical power, and must submit to the ordeal of Mbundu drinking. (*Ib.*)

then I will appoint thee a place whither he shall flee. And if a man come presumptuously upon his neighbour to slay him with guile, thou shalt take him from mine altar that he may die."[1] In Deuteronomy there is an attempt to define accident. The city of refuge is appointed for "whoso killeth his neighbour unawares and hated him not in times past." The first qualification would be true of unintentional, the second of unpremeditated homicide. Then follows a somewhat elaborate illustration of a case of pure accident.[2] "As when a man goeth into the forest with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour, that he die, he shall flee unto one of these cities and live:" and then it is once more stated that the slayer ought not to die, "inasmuch as he hated him not in time past," which would be true of any want of premeditation. Furthermore, even in this relatively enlightened code the unintentional slayer is not fully protected. It is clearly anticipated that the "avenger of blood" will pursue him "while his heart is hot, and overtake him because the way is long," and smite him mortally, and there is no hint that the avenger will be punished. Nor was the alternative, exile to the city of refuge, a merely nominal penalty. Finally, in the Priestly Code there is an elaborate attempt to distinguish different cases. The cities of refuge are appointed for every one that "killeth any person unwittingly," or, as the margin renders it, "through error." (An attempt is made to render the meaning clearer by specifying the implements used, of iron, wood or stone.) On the other hand, he who has killed another, "lying in wait" or "in enmity," is to be put to death by the avenger of blood "when he meeteth him." In intermediate cases the congregation shall judge. "But if he thrust him suddenly without enmity, or hurled upon him anything without lying in wait, or with any stone, whereby a man may die, seeing him not, and cast it upon him, so that he died, and he was not his enemy, neither sought his harm: then the congregation shall judge between the smiter and the avenger of blood according to these judgments."[3] Even here, then, the three cases of accident ("seeing him not"), assault

[1] Exodus xxi. 13, 14. [2] Deut. xix. 4–6.
[3] Numbers xxxv. 15, 20, 21, 22–24.

without intent to kill ("thrust him suddenly") and unpremeditated homicide ("without lying in wait") seem to be in a measure confused. And even in this code the avenger may slay the man-slayer anywhere outside the borders of the city of refuge until the death of the high priest.

Not infrequently in early law we find the distinction that unintentional homicide is atonable by paying the wergild, while deliberate murder gives rise to the blood feud. Thus in the code of Hammurabi[1] the homicide might swear that the blow was unintentional and escape with a fine. So, again, though Germanic law begins by holding a man equally imputable for all that he has done, it is an ancient mitigation that for unintentional homicide the wer is due, and the blood feud should not be waged.[2] The disentanglement of innocent from culpable homicide was a very gradual achievement in mediæval Europe though aided by the Civil and Canon Law, and the forfeiture of goods—the direct survival of the wergild—remained in theory in English law down to 1828.[3]

It is a natural, though, to our minds, a bizarre consequence that in early justice animals and even inanimate objects may be regarded as appropriate subjects of punishment. The slaying of offending animals is provided for in the Book of Exodus. Many cruel punishments were inflicted upon animals in the code of the Zendavesta,[4] and the same thing occurred in medi-

[1] Hammurabi, 206–208, cited above, p. 88.

[2] Pollock and Maitland, ii. 470 and 471. In many cases, however, the innocent homicide can only escape by a recommendation to mercy. In the Anglo-Saxon law the distinction is not so much between intentional and unintentional as between open and secret slaying. (*Ib.*, i. 52.) This recalls the difficulties in Deut. and Numbers. Generally speaking, according to Post, *A. J.*, ii. 28, the responsibility of the agent is not presumed as a ground of his punishment in Africa. But in some cases, as in Aquapin and Ashanti, the penalty for an accidental offence is reduced, and later (in contradistinction to earlier), Kaffir law imposes, as a rule, no penalty on accidental homicide.

[3] Blackstone, iv. p. 188. In practice "as far back as our records reach," the defendant could obtain a pardon and writ of restitution. The clear demarcation of individual responsibility is far from being universal in civilized law. In the Mahometan world, a man's family is collectively responsible even for damage done by him involuntarily. (Post, *Grundriss*, ii. 216, cf. Dareste, p. 64.) In China involuntary offences are punished, though on a reduced scale. In the Japanese code of 1871 accidental injury to parents is heavily punished. (Post, ii. p. 218.)

[4] Entirely, no doubt, under the influence of magical ideas.

æval Europe, where, perhaps under the influence of the Mosaic legislation, it even survived in isolated cases to the sixteenth or seventeenth century.[1] The punishment of animals and inanimate objects was no mere wreaking of blind fury on innocent creatures. Probably to the primitive mind the ox that gored a man, the sword that slew, and the murderer that wielded it, were much more on one level than they can be to us. The animal or tool, if not conscious themselves, might be endued with a magic power or possessed with an evil spirit. It was well to get rid of them before they did more harm. If not destroyed they might be purified. Thus in the English law of Deodand, which was not abolished till the middle of the last century, there is a survival of the view that anything that has killed a man must undergo a kind of religious purification; a cart, for instance, which ran over a man, or a tree which fell on him, was confiscated and sold for charity—at bottom merely a somewhat humanized version of the ancient Athenian process whereby the axe that had slain a man was brought to trial, and, if found guilty, solemnly thrown over the boundary. It need hardly be added that where responsibility is extended to animals and inanimate objects, it is apt to be inadequately defined in the case of idiots, lunatics, and minors.[2]

The principle of collective responsibility does not necessarily disappear with the rise of public justice under central authority. It lingers on, partly through sheer conservatism, but also in many cases for political reasons, to a late date. Thus it is particularly common to find that in political offences the family of the offender suffers with him. The principle of collective responsibility has always been maintained in the Far East, in China,[3] in the Korea, and, under the influence of Chinese

[1] For other instances, see Post, ii. 231.

[2] See Post, ii. 219, and, for the variation of custom under this head, Westermarck, *Moral Ideas*, pp. 265–277.

[3] Post, ii. p. 226. With this is associated punishment for unintentional offences. (*Ib.*, 217.) In Chinese law, accidental parricide is still capital, though the older law appears to have been mitigated. A man who accidentally killed his mother in attempting to defend her, was sentenced to the lingering death, commuted by special decree to decapitation, subject to the Empress's pleasure. See, for various instances, Alabaster, p. 159, ff. A wife killing her husband unintentionally is sentenced to decapitation. (*Ib.*, 192.) A misdeed which however indirectly caused the death of a senior relation is also punished, if the relative be a parent, by death. (*Ib.*,

civilization, in Japan, while it is noteworthy that for political offences the parents and children might be punished under French law right down to the time of the Revolution. Parallels could be found in the laws of the ancient East, of ancient Persia,[1] and of many states of mediæval Europe. It is, in fact, only the decay of the joint family system and the rise of the free individual as the basis of the modern State which definitely does away with this principle, so fundamentally irreconcilable with the strictly ethical notion of justice. An interesting transitional phase is to be found in the Old Testament, where the visiting of the sins of the fathers upon the children is very definitely laid down as a piece of Divine justice in the earlier legislation (I mean in the second Commandment), whereas in the time of Ezekiel it was strongly maintained to be an injustice that when the fathers had eaten sour grapes the children's teeth should be set on edge. It was, in fact, part of the ethical revolution introduced by the later prophets to establish morally for the Jewish code the principle of individual responsibility.[2]

7. With the evolution of social order, and in particular with the growth of central authority, the redress of wrongs begins to take the form of an independent and impartial administration of justice. Let us trace this growth in outline from its beginnings.

320, seq.) A senior relative is punishable for a junior's offence, even if he knows nothing of it. *E. g.* a father was sentenced to one hundred blows because (unknown to him) his son had abducted a girl. (Alabaster, p. 152.) A junior relation is still more heavily punishable for the offence of a senior. If a man murders four members of one family he suffers the lingering process, and his male children, irrespective of age, die with him in equal number to those murdered. In the case of Wang Chih-pin a child of ten was condemned to death for murders by his father. In another instance, the children were condemned to be castrated, the father having killed three persons. (*Ib.*, 164.) The motive is partly to punish the murderer's spirit by cutting off his male descendants, on whose offerings he depends in the new life. (*Ib.*, 58.)

[1] Post, ii. 227.

[2] Ezek. xviii. 2 ; Jer. xxxi. 29. The result is embodied in Deut. xxiv. 16. "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers : every man shall be put to death for his own sin." The same transition is found in the law of the Visigoths. "Let not father for son, nor son for father, nor brother for brother fear any accusation, but he alone shall be indicted as culpable who shall have committed the fault." (Sutherland, *Origin and Growth of the Moral Instinct*, ii. 168.) By Salic law a man might cut himself off from his family, but then, of course, he also lost its protection. (*Ib.*, 167.)

The blood feud proper is revenge guided and limited by custom. It is not justice. It is waged by two conflicting parties, and there is no impartial third party to judge between them. But even in barbaric society the blood feud does not rage wholly without check. The public opinion of the group is always a force to be reckoned with. Every man's rights and obligations are fixed by custom. The very vengeance taken on those who infringe them is a custom, and directed in all its details by tradition. The headman or the elders of the clan or village are prepared to listen to complaints, to decide whether a wrong has been done, and, if so, what the reparation ought to be. The injured party may appeal to them if he pleases, and it may be that the aggressor will abide by their decision. If so, the affair is arranged perhaps by composition, perhaps by a stated penalty. Otherwise the parties will fight it out or it will come to a feud.[1] In short, there is an effort on the part of the leading men to keep the peace and adjust the quarrel. Sometimes they will intervene of themselves if a feud becomes serious and threatens the general peace.[2]

The "court," if so it may be called, appears at this stage rather as peacemaker than judge.[3] The disputants may ignore it, preferring to trust to their own strength and that of their friends. Yet it is from the first the avenger's interest to have public opinion with him. He relies on the countenance and practical help of his kindred and fellow-tribesmen. At least he must avert their opposition. If the facts are peculiarly flagrant the neighbours will be with him and he will have the less difficulty in executing vengeance.[4] Perhaps even the kindred of the

[1] For illustrations, see Appendix to this chapter, p. 125, etc.

[2] Thus among the Esquimaux, according to Reclus, murder was avenged by the nearest relative, but if fresh retaliation ensued, several villages intervened and the chief men pronounced sentence, otherwise public intervention was very rare. (*Primitive Folk*, p. 85.)

[3] Thus among the Kondhs we read that society intervenes to prevent revenge by composition, "which has in view exclusively the private satisfaction of individuals, not the vindication of any civil or moral rules of right." Hence, notwithstanding this intervention, retaliation is generally the sole remedy for wrongs of whatever order. (Macpherson, *Memorials of Service in India*, p. 81.) Cf. Appendix to this chapter, p. 127.

[4] There may be no trial and no set form of justice, but merely, as among the Central Australians, a meeting convened by the elder men to carry out the act of vengeance. (See Spencer and Gillen, ii. 556–568.)

wrong-doer will refuse to stand by him. Thus it becomes the interest of the avenger to make his case plain to the neighbours, and they in turn wish to hear what the accused party has to say. A palaver is held. The avenger comes with his kinsmen and friends. They state their case and announce their intention of seeking revenge. The accused is also present, backed by his kin, and repels the demands made on him. It may be that the matter is settled between the groups concerned. It may be that the neighbours or the chief give sentence, but even so it does not follow that they enforce it. They may give the appellant their moral support,[1] and leave it to him to obtain satisfaction as best he can. But of course their decision helps him to get the opinion of the tribe on his side, and their moral force will be translatable into physical force. It will mean so many more backers for him, and so many less for his opponents. This support may be disdained by the strong, but it will be valued by the weak, and will be upheld by those who desire internal peace. Thus even under the clan and tribal organization of society some form of public intervention may arise alongside of private redress. Feuds are averted by the adjustment of disputes, or, if a wrong has been done, by getting the complainant to accept composition, and the aggressor to undergo some penalty which will be a mitigated form of revenge, or by bringing the two parties to fight it out under the regular forms of a duel.

Such methods of mitigating the blood feud are stimulated by the growth of the kingly power—that is to say, of an organized force outside the contending families or clans, which can summon them before its bar, decide their cause, and require them to keep the peace. The king, whose duty and interest it is to maintain public order, treats crime—or certain kinds of crime—no longer as an offence against the individual whom it primarily affects, but as a menace to public tranquillity, a breach of his

[1] Thus among the North American Indians, the Ojibways and the Wyandots and other tribes have a council before which the avenger gets a judgment in his favour. He then demands compensation, and that failing, takes revenge. (Kohler, *Z. f. V. R.*, 1897, p. 407.) So again in the Malay region cases come before the chief of the *suku*, or, if grave, before a gathering of chiefs, but the execution of the murderer falls to the nephew of the deceased. (Waitz, v. i. 143.) See further, Appendix, pp. 124–7.

"peace."[1] This, if he is strong enough, he will punish directly; if not sufficiently strong, he will deprive the offender of his protection, put him outside the king's peace, and compel him by fine to buy back what he has lost. Thus we find crime punishable by wite as well as by bôt—a fine to the king side by side with compensation to the kinsfolk.

But from moral assistance the transition to physical assistance is not very difficult in idea, however slow and cumbrous it may have been in practice. There is more than one method of transition. Sometimes we find the public authority, the elders or the whole body of the neighbours, or later the regular magistrate, exerting themselves to arrest the offender and handing him over to the avenger of blood for execution, or judging between the avenger of blood and the man-slayer, whose act was "unwitting." Thus in Deuteronomy, if the deliberate murderer flies to a city of refuge, "then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood that he may die."[2] But without taking an active part in the pursuit and capture of the offender the court had an effective weapon in the power of outlawry. Since in accordance with early ideas all personal rights depend upon membership of a society united for mutual protection, it follows that the man excluded from the group is in the position of a stranger and an enemy; he is a wolf's head, a wild animal whom the firstcomer may put to death at sight, with whom nobody

[1] Common in Germanic law. See, for England, Pollock and Maitland, ii. 451. The Kaffirs distinguish (1) offences against the king, which consist in infringements upon his property or the number of his subjects. In these they include treason, sorcery, murder, cruelty, rape, and abortion. (2) Offences against private people, which include adultery, immorality, theft, injury to a garden, etc. A similar distinction is found among the Kimbunda. (Post, *A. J.*, ii. 54.) This is in effect a rudimentary distinction between civil and criminal justice, and shows at least one avenue of transition to the conception of public crime. The notion of injury to an individual is applied to the king, but owing to the king's special relation to the community, the notion in being applied to him is unavoidably extended and modified. In fact, potentially it covers all anti-social action.

[2] Deut. xix. 12. So still in the priestly code, Numbers xxxv. 12–25. The law of the Germanic peoples in the Frankish period, appears in a transitional stage. The Eastern Goths, Burgundians, Bavarians, and Anglo-Saxons left execution to the complainant. The law of the Western Goths excluded private execution; the Salic law gave the complainant the choice. (Schröder, p. 371.)

may associate, to whom nobody may give food or lodging. Outlawry can therefore be applied either as a punishment or as a process—as a method of bringing the accused into court. What more reasonable than that if he will not submit to law he shall lose the protection of the law? With this weapon, potent in proportion as the social order is developed, the court of early law consolidates its authority, and from being a casual institution of voluntary resort for those who wish the sympathy of their neighbours in avenging their wrongs, becomes an established authority with compulsory powers before which either party can be summoned to appear at the instance of his opponent.

8. But we are still a long way from a modern Court of Justice. The primary function of a court thus established is not so much to discover the merits of the case and make an equitable award, as to keep the peace and prevent the extension of wild and irregular blood feuds. What the court has to deal with is the fact that a feud exists. A comes before it with a complaint against B of having killed his kinsman, or stolen his cattle, or carried off his daughter. Here is a feud which, in the absence of a court, A will prosecute with his own right-arm and that of his kinsmen if he can get them to help him. B, again, will resist with the help of *his* kinsmen, and so there will be a vendetta. The court, whose primary object is to secure a settlement, does not go into nice questions as to the precise merits and demerits of A and B, but it can prescribe certain tests whereby the appellant or the defendant may establish his case. It sets the litigant "a task that he must attempt. If he performs it, he has won his cause."[1] The performance of this task is not, to our minds, proof of the justice of his cause. It is rather the compliance with a legal and orderly method of establishing a case, but at the stage we are considering it was probably regarded as satisfying justice, at least, as far as justice claimed to be satisfied.

What task, then, would the court award? It might be that the litigant should maintain his cause with his body. The parties would then have to fight it out in person or by their

[1] Pollock and Maitland, ii. 602.

champions. Here we have the method of the blood feud, but regularized, limited, and transformed into the judicial duel. Again, the court might put one or both parties to the oath. But this is not the oath of the modern Law Court—that is to say, it is not a solemn asseveration of the truth of certain evidence of fact, but an assertion of the general justice of the claim alleged, or of its injustice, as the case may be. And as the feud will not be waged by the individual claimant alone, but with the aid of all his kindred, so the court will expect the kindred to come and take the oath along with him. Hence the institution of oath-helpers, the compurgators, who are in point of fact the fellow-clansmen, all bound to the duty at this stage of swearing their friend out of the difficulty, just as before they were bound to help him out of it by arms. The compurgators are simply the clansmen fighting with spiritual weapons instead of carnal ones. Success in the cause will depend not on the opinion formed by the court as to the veracity of one side or the perjury of the other, but on the ability of the parties to get the full number of compurgators required, on formal correctness in taking the oath, and if both parties fulfil all conditions and no further means are available for deciding between them, on certain rules as to the burden of proof.[1]

The provision of such further means of deciding between the parties is logically the next step. So far, the judicial process has appeared merely as a regularization of the blood feud, but both the oath and the judicial combat point the way to a higher ideal. The court itself is not in a position to try the merits of the case unless it be some very simple matter of the criminal caught red-handed, but it may refer the decision to the Unseen Powers, to the Gods, or to the magical qualities inherent in certain things.

[1] Which oath prevailed in case of a conflict, would be decided according to the custom ruling the case. One party would be "nearer to the oath" than the other. For instance, where the criminal is caught in the act, the oath of the prosecutor with his oath-helpers is conclusive proof and the offender has no opportunity of self-defence. (Schröder, p. 363; cf. Pollock and Maitland, ii. 579.) In the Frankish period the complainant might also, if the circumstances allowed, demand the ordeal; in other cases, with a few exceptions, the burden of proof was on the opposite side. (Schröder, *op. cit.*, pp. 363–366.) Where the oath is not decisive, the parties go to the duel or to the ordeal.

Thus the judicial duel, instead of being a mere carnal fight regularized and limited by certain rules, may be conceived rather as an appeal to the judgment of God, and the victory as His sentence which the court hesitates to pronounce on the basis of its merely human wisdom. Similarly the oath—though less than evidence as we conceive evidence—is also more, for it is an appeal to powers in which primitive man implicitly believes, to take vengeance on him who swears, if his cause be not just. Hence the form of the oath is everything, for the Unknown Powers are great sticklers for form. The oath-taker calls down their punishment on himself and his family by a set formula which they will rigidly obey. If in the formula he can leave himself any loophole of escape the oath is void: it is no true summoning of the vengeful powers, and the court will disregard it, but if it is complete and sound in point of form, then there is no escape. One of two things must happen: either the oath was true or the curse will fall, and thus perjury brings its own punishment.[1]

Hence it is that for any given charge the law may call upon a man to purge himself by oath, or perhaps to purge himself along with a specified number of oath-helpers who will suffer with him if the oath is false, and the oath-helpers required may be increased according to the seriousness of the crime. If the oath fails the prescribed punishment follows. If it is duly taken, then either the accused was innocent, or he has inflicted the punishment entailed by the broken oath on himself and his oath-helpers.

But the consequences of a false oath were not immediately apparent. If the court wished to have the judgment of the Unseen Powers before it some more summary process was necessary. This was found in the Ordeal, a test to which both parties could be submitted if necessary, and of which the results were immediate and manifest. Probably no institution is more universal at a certain stage of civilization than that of testing the truth or falsity of a case by a certain magico-religious

[1] Thus the subsequent misfortune is taken as proof of perjury, and sometimes with a certain inconsistency the secular arm is then called in to increase the penalty. Thus among the Kondhs of Orissa, and also among the Congo people, if the curse falls, the oath-taker is banished along with his family. (Post, ii. 493.)

process—the eating of a piece of bread, the handling of burning iron or boiling oil, jumping into water, walking through fire, exposure to wild beasts, and so forth. The details vary, though even in detail resemblances crop up at the most remote periods and in the most remote places, but the general principle is still more clearly constant through the ages and the climes. Truth cannot at this stage be tested by human evidence. At most the criminal caught red-handed may be summarily dispatched upon the evidence of eye-witnesses given there and then, but the complicated civil or criminal processes of the civilized world imply an intellectual as well as a moral development which makes them impossible at an early stage. It is the gods who judge; the man who can handle hot iron is proved by heaven to be innocent; the woman whom the holy river rejects is a witch; he whom the bread chokes is a perjurer. Nor are these tests wholly devoid of rational basis; it is not so difficult to understand that the guilty man would be more liable to choke than the innocent, not because bread is holy, but because his nerves are shaken. It is quite intelligible that in a credulous age the false oath would bring its curse in the form of a will paralyzed by terror, just as we know that amongst many savages witchcraft really kills through the sufferer's intense fear of it. Lastly, if the criminal may be ready to take his chances of the curse in preference to the certainties of the scaffold, he may find it difficult to get compurgators to stand by him, and in the face of their plain knowledge involve themselves in the same risk.

9. Thus particularly in the institution of compurgation we find the beginnings of a new conception, the conception that it is the duty of the court to try the case, to obtain proof of facts, to give its own verdict based on its own judgment, and execute its own sentence by its own officers. The steps by which this change is achieved belong rather to the history of jurisprudence than to that of Comparative Ethics. Only certain broad features of the new phase concern us. Its primary condition is perhaps not so much a new growth of moral ideas as the formation of an effective organ of government. The elders or the petty chief of the village community hesitate to carry out a death sentence or inflict corporal punishment for fear of involving themselves in

the blood feud.[1] There must be an executive power with sufficient force behind it to raise its officers above the fear of revenge before a public system of justice, in the full sense, can arise. Hence the decay of blood revenge and the rise of public justice are frequently associated with the growth of kingly power. For example, in Europe in the early Middle Ages we have seen that certain offences were treated as breaches of the king's peace. This peace was a protection afforded in the first instance to certain places and times, but it was gradually extended, largely it would seem through the king's protection of the roads—"the king's highway"—to all places and all times. Thus the act which had been a breach of the king's peace, punished by the withdrawal of his protection only when committed at certain times and places, now became an offence against him at all times and places. Its punishment was still outlawry. But as outlawry deprived a man of all rights, it enabled the king to inflict what penalty he chose. The criminal, in fact, was at his mercy: any penalty short of death with forfeiture of all goods would be an indulgence, and hence the Royal Courts could fix a scale of punishments at their pleasure.[2]

With the growth of public justice the function of the courts is changed: they have no longer to supervise the feuds of hostile families, but to maintain public order, to detect and punish crime, and to uphold innocent people in their rights. This involves numerous changes. In the first place, self-help, the obtaining of satisfaction by the strong hand, is no longer necessary. The injured man can get a remedy from the court, and vengeance is forbidden. The victory is not immediate, and often the State has to come to some compromise with the old system. For example, vengeance may be allowed *in flagrante delicto*, or within a certain period after the offence. Where state justice is very weak, an asylum may be granted within which revenge must not be executed; in other cases where the process is further

[1] So Prof. Robertson Smith remarks on the appearance of corporal punishment in Deuteronomy, that it is evidence of the comparatively settled state of the country and the growth of the social order since the time of the Book of the Covenant. No Arab Sheik would inflict corporal punishment on a tribesman for fear of revenge. (Deut. xxv. 3. Robertson Smith, *Old Testament in the Jewish Church*, p. 368.)

[2] Jenks, *Law and Politics*, pp. 109–117; Pollock and Maitland, ii., pp. 453, 463, etc.

advanced and justice is getting the upper hand, revenge is allowed *only* with the consent of a court.[1] Or lastly, excluded from all ordinary cases, revenge is tolerated as a concession to human weakness in cases where strong passions are excited—for example, in breaches of the marriage law to this day in many civilized countries.[2] The transition was the harder because it involved a fundamental ethical change. From its beginning, as we have seen, social order rested on the readiness of every man to stand by his kinsmen in their quarrels. Hence the duty of avenging the injured kinsman, and therefore of loving one's neighbour in this sense and hating one's enemy, was the most sacred of primitive principles, bound up with everything that made a common life possible. Public justice bade men lay aside this principle, and its triumph constitutes one of the greatest of social revolutions.[3]

[1] This, in strictness, is Mahometan law. (Kohler, quoted in Post, i. p. 260.)

[2] For instances see Post, i. pp. 260, 261. Post quotes the Japanese Law Book of 1873, which treats premeditated blood revenge as murder, but excuses the son who strikes down the murderer of his father on the spot.

[3] The existence of authoritative public courts with executive powers, dealing with the bulk of disputes, may be taken as a general feature of civilized society, but in the lower stages of civilization we find more or less of compromise with the principles of private vengeance. In the code of Hammurabi, courts exist and witnesses are mentioned, but that punishments were always public, except in the case of the erring wife, does not seem so clear as Kohler and Peiser think. (*Hammurabi's Gesetz*, § 126.) Certainly the provisions for punishment are saturated with the ideas of the blood feud (cf. above, pp. 85–88). In Manu a list is given of eighteen cases with which the courts deal (viii. 4–7), but self-help is countenanced, and homicide is justifiable, "in a strife for the fees of officiating priests, and in order to protect women and Brahmanas." "By killing an assassin the slayer incurs no guilt, whether he does it publicly or secretly." (Manu, viii. 348–51 ; cf. Vasishtha, iii. 15–18, 24, who among six kinds of assassins reckons an incendiary and the abductor of another's wife.) Chinese tradition places the first public execution in the reign of Huang-ti, B.C. 2601, before which time chiefs had fought with one another and taken no prisoners. (Alabaster, 52.) In the present law vengeance and composition are in general forbidden (*ib.*, pp. 5, 6), but a son is justified in killing his father's murderer on the spot (*ib.*, 165), and if he kills him afterwards will only be bambooed. Similarly the husband may kill his wife's lover on the spot, and the wife herself with a relatively light penalty. (*Ib.*, 251.) In Mahometan law retaliation still plays a considerable part. In Mahomet's time the blood feud was in full vigour. Mahomet imposed the death penalty by law for wilful murder and enforced composition for involuntary homicide, the wer being $\frac{1}{2}$ for a woman and $\frac{1}{15}$ for a pagan, all the kin being responsible for it. (Dareste, p. 64.) Wounds are also punishable by retaliation or composition. (*Ib.*, and Hughes, *Dictionary of Islam*, p. 481.) The retaliation is executed by the next of kin (Hughes, 481), but,

But if the kindred be no longer allowed to avenge themselves, the corresponding right of the offender to make peace with the kin is also withdrawn.[1] A crime is now a public affair, and in varying degrees according to time and country the public authority takes upon itself the function of maintaining order and of discovering as well as punishing offenders.[2] The trial

if legitimate, only, it would seem, with the judgment of a court. Private revenge without sanction is, however, not entirely excluded. (Post, i. 260.) In Rome, while the earlier system of retaliation was already undergoing disintegration at the period of the Twelve Tables (Girard, 381), in the form of private execution self-help lasted long, and was not made criminal in principle till the close of the Republic, by the *Leges Juliae de Vi Privata et Publica*. (Ihering, *Geist des Römischen Rechts*, p. 166.) The full substitution of public punishments for private vengeance was completed in Attica between the Homeric period and that of Draco. Sparta and the other Greek States went through a similar transition. (Leist, 381.) Nothing marks the re-barbarization of Europe in the Early Middle Ages so strongly as the fact that the system of public justice built up in the Græco-Roman civilization gave way to the barbaric system. On the other hand, the services of the Mediæval Church in deprecating vengeance and upholding social peace ought not to be forgotten. So great a change as the suppression of vengeance by justice is not accomplished but by slow degrees, and in Europe the old system left its legacy to the modern world in the form of the duel. The peculiar notions of honour engendered by militarism maintained in the classes whose trade was fighting the belief that the stain of a disgraceful deed could be wiped out by superior skill in sword-play, while it was the bounden duty of a man who had suffered a mortal injury to give his traducer or assailant the opportunity of also killing him. Such beliefs, so deeply rooted in the habits of a military caste, long survived the prohibitions of the Church and the edicts of kings. (See *Decret. Grat. C. J.*, 464, referring to the judicial duel.) In the *Decret. Greg.*, 805, a clerk is to be deposed for duelling, and tournaments are forbidden (p. 804). The latter, however, were legalized by John XXII. (p. 1215). The Council of Trent threatened not only duellists, but kings or feudal lords who allowed duelling in their territories with excommunication. (*C. J.*, pp. 98, 99.) In England the duel succumbed to the cool common sense of middle class juries. On the Continent, though undergoing a continual process of attrition, it is maintained in a dishonoured old age among such other perquisites of the military class as the right to run unarmed citizens through the body for an alleged insulting word.

We cannot say that public justice with individual responsibility and rational procedure is confined to civilized, or the blood feud to barbaric society. For traces more or less important of the blood feud remain in civilized justice, and in barbaric societies in which a strong military ruler has arisen the king acquires judicial powers. But we can say that public justice is predominant in the one case and private vengeance in the other, and on the whole the transition from barbarism to civilization appears to be more closely connected with the rise of authoritative tribunals for the redress of wrongs than with any other single change of institutions.

[1] See Pollock and Maitland, ii. 485.

[2] The rise of impartial public justice in Europe connects itself with "Trial by Inquest." Early in the Middle Ages the Bishops made diocesan

ceases to be a milder form of the blood feud. The complainant no longer exposes himself to equal punishment by way of retaliation in case he loses his suit. What was previously accusation now becomes denunciation.[1] Again, though the injured party may set the whole process in motion, the result will differ vitally according to the nature of the act of which he complains. Justice, having public interests in view, will count not only the magnitude of the injury suffered, but the degree of culpability in the man who inflicted it. Vengeance, the object of the older process, breaks up into the two distinct ideas of punishment inflicted by the judge, and restitution assigned to the complainant. Civil and criminal justice are distinct.[2]

10. Once become serious in its determination to investigate the case before giving sentence, public justice could not long be satisfied with the older supernatural machinery. In mediæval Europe it was early a matter of remark that the battle was not always to the just. "We are," says the Lombard King, Luitprand, "uncertain about the judgment of God, and have heard that many through the battle lose their cause without justice;

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tours and held inquests into public morals, and in the ninth century they employed a "jurie d'accusation," who indicated delinquents. These were at first allowed to purge themselves by oath, but this right was withdrawn under Innocent III., and the court was allowed to proceed *per inquisitionem*, holding an inquiry, and requiring not purgation but defence. The accuser at this stage is a public authority, not merely a private enemy prosecuting a feud. A corresponding development occurs in England when the Grand Jury, as representing the common knowledge of a neighbourhood, present a list of criminals for trial. The accusation could not any longer be submitted to trial by battle, as the accused could not fight the whole Grand Jury (Stephen, i. 254), and as ordeals were falling into discredit the only resource was the Inquest. This was a method, already in use in Norman law, of establishing facts by the sworn judgment of a number of men (petty jury) representing "the verdict of the country." Thus our system, though it has retained much of the accusatory character, has been deeply influenced by the Inquisition, or, as we call it, "Inquest."

[1] Esmein, p. 84. The "accusatory" method fell into disuse in France in the fourteenth century. But the penalty of retaliation was retained, though softened in application. (*Ib.*, 108.) Denunciation was readily conceded in the case of commoners, while nobles still retained the right of combat. (*Ib.*, 85.)

[2] The distinction is not affected by the fact that both results may be sought by a single process. *E. g.* in French law a criminal may be condemned to pay damages to the injured party by the same sentence which consigns him to prison.

but the Law itself, on account of the custom of our race of Lombards, we cannot forbid."[1]

It was therefore a great step in advance when ordeals, which had been adopted by the Church after the barbarian invasions, were condemned by the Lateran Council of 1215. As a consequence they disappear in England after the reign of John,[2] while the oath of compurgators is gradually converted into evidence to character. The ordeal by battle[3] remained, but an alternative was offered in the form of a judicial inquiry with witnesses and evidence. The accused might, in English phrase, "put himself upon his country," *i. e.* let his case go before a jury, men of his neighbourhood knowing the facts and prepared to testify to them, or in French phrase the accused could be offered the "enqueste du païs." And this alternative, if at first optional, soon manifested its vast superiority, and the settlement of all disputes and all accusations by an impartial tribunal, which has heard what both sides have to say, becomes an integral part of the civilized order.[4] But even-handed justice is not reached at one stride. The public authority having once taken up the function of repressing crime are more bent on efficiency in the maintenance of order than on nice considerations of justice to

[1] Charlemagne, on the other hand, ordered all men to believe the judgment of God without any doubt. (Schröder, 367.)

[2] Pollock and Maitland, ii. 599. In France, compurgation and unilateral ordeals almost completely disappeared in the thirteenth century. The oath with oath-helpers was still not uncommon in England, but the view "that you cannot wage your law about facts that are manifest" was beginning to prevail. (Pollock and Maitland, ii. 634.)

[3] It was forbidden in France by St. Louis in 1260. "Nous defendons a tous batailles par nostre domengne et au lieu de batailles, nous mettons preuves de tésmoins," but this ordinance could not be imposed in a day upon the Signorial courts. Before the accession of Edward I. judicial combats were limited to felony, but one of the parties might prefer a jury. Champions for hire still existed. (Pollock and Maitland, ii. 632, 633.)

[4] For a long while the alternative was treated as optional in English law. The oath and the ordeal had been the old legal methods of proof, and "no one," say the *Leges Henrici*, with the air of resisting a monstrous and novel injustice, "is to be convicted of a capital crime by testimony." (Pollock and Maitland, ii. 650.) But urged by manifest necessity the lawyers found indirect methods of compulsion; a man cannot be hanged for murder merely because he is proved by witnesses to have committed it, unless he first agrees to stand or fall by what they say, and forego his right to the ordeal. But though he cannot be compelled, he can be rigidly imprisoned until he gives his consent, and, finally, he can be pressed to death by the "peine forte et dure."

individuals. Their tendency is to treat the accused man as guilty, and means of proving his innocence are somewhat grudgingly meted out to him as privileges rather than as rights, while deficiencies of evidence are boldly supplemented by the use of torture. In English law, indeed, torture (except in the case of the *peine forte et dure*) never seems to have been fully recognized: if used by the absolute monarchy it was as a political instrument rather than as part of the ordinary machinery of law. On the Continent, on the other hand, owing partly perhaps to a stricter theory of the amount of evidence necessary for proof, partly to the fact that the authorities were more determined to suppress crime than to protect individuals from the possibility of undeserved suffering, torture became a recognized method of supplementing defective evidence. The judicial conscience was easier if it extorted a confession from a man before condemning him, than if it acted solely on evidence undistorted by physical suffering.[1] Even where torture was not allowed the accused was not always put on a level with the prosecution as to the right of giving evidence, calling witnesses and employing counsel. It is not until all these conditions are fulfilled that a Court of Justice can be said to come up to the ideal of a place in which the full merits of the case are investigated before a verdict is given. Even *now* it must be remarked that an English trial preserves much of the form of the old judicial combat. Its method of obtaining a verdict is still that of pitting attack and defence against one another. It may be that this is the best method of

[1] Torture was originally applied only to slaves in Roman law, but was extended to freemen in cases of treason and afterwards in other cases as well. It was originally unknown to the barbarians, but under Roman influence it was introduced into the Salic, Burgundian and other laws in application to slaves. (Esmein, p. 93; Schröder, p. 369.) Fostered by the need for evidence in the procedure by inquest, and by the determination to repress crimes, it gradually became, especially in Germany and Italy (Esmein, p. 284), a flagrant abuse. All the guarantees which the accused had were taken from him by degrees. The procedure became secret, he was not allowed to employ counsel or to cite witnesses. In this direction the inquisitorial process was pushed further in France than elsewhere; England was apparently saved from it by the gradual change which converted the jury from witnesses into judges of the case. It is noteworthy that the severity of the French procedure was accepted by the public and was even popular. (*Op. cit.*, p. 158.) The public feeling of the period went with the authorities in concerning itself more for the suppression of crime than for supporting the rights of accused individuals.

obtaining truth where human interests and passions are at stake, and that the advocate must always retain a place beside the judge: but what seems clear is that the power of the purse in retaining the best legal skill is a make-weight, especially in civil cases, of no slight practical importance; and it is possible that our descendants will look back upon a system which allowed wealth to count for so much before what should be an absolutely impartial tribunal, as not differing so much as we should like to think from the old ordeal by battle. The fight with the purse is not the ideal substitute for the fight with the person.

11. We have seen that public justice often led to severity in the process of obtaining truth; still more was this the case in the punishment of crime. Accompanying the growth of order in a barbarian society there is, as has been remarked above, a tendency to substitute a system of composition for blood vengeance by a money payment. This system made for social peace, but, particularly with the increase of wealth and difference of rank, it lent itself to frightful abuses. Crimes, punished perhaps too fiercely in early society, became for the well-to-do too lightly and easily atonable, and it is not surprising that at the next stage of social development, in which the central power has consolidated itself and the executive has become strong enough to dismiss any fear of the blood feud, a period of severer punishment should set in. Crime now becomes a revolt against authority, a challenge to the powers that be, civil and perhaps ecclesiastical as well, to put forth all their strength to subdue it. Moreover, the central authority at its best acts in the interests of public order, and on the whole represents the principle of impartial judgment as between disputants, and of progress towards internal peace and the reign of law. On the other hand, order is still difficult to maintain and powerful families are recalcitrant. From such causes as these acting in combination the criminal law now reaches the acme of its rigour. Death penalties or savage mutilations are inflicted for offences of the second and third order, torture is freely used to extort confession, and the brutality of the mob is called in to supplement that of the executioner.

As to the severity, or rather barbarity, of the criminal law in

Europe down to the nineteenth century little need be said, as the broad facts are well known. In England death was theoretically the penalty for all felonies except petty larceny and mayhem, from the Middle Ages down to 1826. This rule was subject to the exceptions based on "benefit of clergy," which originally meant the right of a clerk to be tried in the ecclesiastical courts; then, being extended to all who could read, became something of the nature of a class privilege, and finally in 1705, the necessity for reading [1] being abolished, was converted into a means of grace. The punishment for a "clergyable" offence was to be branded in the hand and imprisoned for not more than one year, except in the case of larceny, which by the law of 1717 was punishable by transportation for seven years.[2] From the fifteenth century onwards a succession of statutes excluded more and more offences from benefit of clergy, and thus at the end of the seventeenth century such offences as arson, burglary, horse-stealing, stealing from the person above the value of a shilling, rape and abduction with intent to marry, were all capital "whether the offender could read or not." [3] In the eighteenth century the list was lengthened, but transportation was often substituted for the death penalty. Women were still burnt alive for the murder of a husband or master, or for coining.[4] Both men and women were whipped, the men publicly through the streets, the women as a rule privately, for petty thefts.[5] The pillory was still in use for perjury and other offences.[6] Meanwhile the state of the prisons, where innocent and guilty, debtors (often with their families) and convicted criminals were all huddled together without discrimination, was, when Howard began his work, a scandal of the first magnitude. Gaol-fever raged, prisons were still private property, and the prisoner, innocent or guilty, had to fee his gaoler and pay for every comfort and even for necessaries. In the Bishop of Ely's prison the gaoler prevented escapes by chaining his prisoners on their backs on the

[1] Peers, and clerks in holy orders, however, retained special privileges.

[2] Stephen, i. 463, etc.

[3] *Op. cit.*, 467.

[4] In practice they were generally strangled first, but this depended on the executioner. Even the torture of the flames did not prevent an eighteenth century mob from pelting and jeering at the victim. See the account of the burning of Barbara Spencer for coining in 1721. (Pike, ii. 287, 288.)

[5] *Ib.*, 380.

[6] Till 1816. For perjury till 1837. (*Ib.*, 377.)

floor, and fastening a spiked iron collar about their necks. "Even when re-constructed it had no free ward, no infirmary and no straw; and debtors and felons were confined together." [1]

12. But even before Howard's time a new order of ideas was slowly emerging. As society becomes more confident in its power to maintain order, the cruelty and callousness that are born of fear are seen in a new light. More humane influences make themselves felt, and from that moment excessive severity begins to militate against the proper execution of the law, especially under a jury system like ours. With the advance of civil and religious liberty, political or ecclesiastical offences grow rare, and a breach of the law becomes more and more synonymous with a grave moral offence against society. The whole problem of criminal justice is thus transferred to the ethical plane, but the change raises problems which a century has been too short a time to solve. The general right to punish may be derived from the right of society to protect itself. This principle taken by itself [2] might be held to justify the barbarities of the old law, had not experience shown that extreme severity was not in reality an effective instrument of discipline, while it undoubtedly tended to harden manners and accustom people to witness suffering with indifference. Its dealings with the criminal mark, one may say, the zero point in the scale of treatment which society conceives to be the due of its various members. If we raise this point we raise the standard all along the scale. The pauper may justly expect something better than the criminal, the self-supporting poor man or woman than the pauper. Thus if it is the aim of good civilization to raise the general standard of life, this is a tendency which a savage criminal law will hinder and a humane one assist. Moreover, the old rigour, so far as it rested on reason at all, was based on a very crude psychology. People

[1] *Ib.*, 355.

[2] So taken it is a one-sided account. Punishment, like other actions, can only be justified as doing the maximum of good and the minimum of evil admitted by the circumstances to all concerned. If any evil (suffering or loss of character) is inflicted on the criminal which is not absolutely necessitated by social security, or the ultimate welfare of the criminal himself, it is evil inflicted for its own sake, which is the essence of immorality.

are not deterred from murder by the sight of the murderer dangling from a gibbet. On the contrary, what there is in them of lust for blood is tickled and excited, their sensuality or ferocity is aroused, and the counteracting impulses, the aversion to bloodshed, the compunction for suffering, are arrested. Fear, on which the principle of severity wholly relies, is a master motive only with the weak, and only while it is very present. As soon as there is a chance of escaping detection it evaporates, and, it would seem, the more completely in proportion as the very magnitude of the penalty makes it difficult for a man really to imagine *himself* as the central figure in so terrible a drama. Finally, the infliction of heavy penalties for secondary crimes may induce a reckless despair, and the saying about the sheep and the lamb was but too apt a comment on the working of the criminal law at the time. Thus the first step of reform was to abolish the ferocious penalties of the old law. In this direction a long list of well-known and honoured names, Beccaria, Howard, Bentham, Romilly, Fowell Buxton, Elizabeth Fry, indicate roughly the intellectual and moral influences at work. The Society of Friends,[1] French Rationalists, English Utilitarians and the Evangelicals played their part in this, as in so many of the changes that have made the modern world. The movement was under weigh by the second third of the eighteenth century. Beccaria's book was published in 1764 and had an immediate success, bearing early fruit in the abolition of torture on the Continent. Branding was abolished in England in 1779. Capital punishment had been abolished for a time in Russia in 1753, and the purchase of prisoners as galley-slaves was forbidden by Maria Theresa in 1762. In England the *peine forte et dure* was abolished in 1772, and in 1770 a House of Commons Committee even reported that there were some offences for which the death penalty might with advantage be exchanged for some other punishment. These few indications show that the tide was beginning to turn. In France the movement was hastened by the Revolution. The Declaration of Rights in 1789 laid down the controlling principle of the modern theory

[1] Already in founding Pennsylvania, Penn had allowed capital punishment for murder alone. The Philadelphia society for relieving distressed prisoners was formed in 1776. (Wines, 142.)

that "the right to punish is limited by the law of necessity," and this was supplemented in 1791 by the declaration of the Assembly that "penalties should be proportioned to the crimes for which they are inflicted, and that they are intended not merely to punish, but to reform the culprit."[1] In accordance with this principle the Assembly made imprisonment the chief method of punishment, and founded the penitentiary system of France. In England the great re-action produced by the Revolution retarded the reform of the criminal law, but throughout the time of the Revolutionary Wars, men like Romilly fought an uphill fight. He succeeded in suppressing the death penalty for pocket-picking in 1808, but his subsequent efforts to abolish capital punishment for stealing goods of the value of five shillings from shops were frustrated by the House of Lords.[2] Little progress, in fact, was made till 1832, when horse and sheep stealing ceased to be capital, and from this time onwards the list of capital offences was steadily reduced, till in 1861 murder was for all practical purposes the only one that remained.[3]

Meanwhile, as substitutes for the old savagery, there grew up first the transportation and then the penitentiary system. Regarded as a means of giving the offender a fresh start in life in new surroundings remote from his old bad associates and the memory of his crimes, transportation has much to recommend it, but it was clearly incompatible with colonial development. It was necessary to fall back on the prison system, and the efforts of reformers have been devoted to the task of making confinement —a thing soul-destructive in itself—as nearly compatible as may be with the regeneration of the prisoner. These efforts have hardly passed the experimental stage, yet certain results have emerged. The necessity for a classification which prevents the first offender from being contaminated by the hardened gaol-bird, the benefits of action and practical employment, the superiority of hope to fear as a stimulus to good conduct and the consequent advantages to be found in allowing the convict means of improving his position and even shortening his sentence by good behaviour,

[1] Wines, p. 86. [2] Pike, 450.

[3] Pike, *ib.*; Stephen, i. 474. Together with murder, treason, piracy with violence, and setting fire to dockyards and arsenals remain nominally capital offences. It will be remembered that a case of treason was recently tried and the death sentence formally passed, but very shortly commuted.

are matters of general agreement. But it is clearly necessary to go further than this. The plan of imprisoning a man for a longer or shorter term, and then, without asking what effect his experience is likely to have had on him, turning him loose again upon society, a broken human being less capable than ever of earning an honest living, cannot stand. The old way of hanging at least rid society of the criminal. It stood condemned for its utter barbarity, which was indirectly as harmful to society as it was cruel to the sufferer. The modern method is still a terrible penalty, at least to the better sort of criminals, and far from relieving society of their presence, tends to harden and degrade them further. Hence judicious thinkers like Frederick Hill, in his report of 1839, soon recognized that a more thorough system was required. The offender must be reformed, and at need he must even be detained until he has given good promise of reformation, and society must help him back into honest ways.[1] The most thoroughgoing attempt in this direction is that of the Elmira system, followed now in several American states, in which, the sentence being wholly or within limits indeterminate, the fate of the convict depends on his own exertions. He can raise himself from a lower to a higher grade by continued good behaviour, and finally can obtain liberation on parole.[2]

13. Whatever the outcome of these experiments, the modern state stands committed to the humane method of criminal treatment, and could not revert to the old plan save at the risk of a general re-barbarization.[3] That being so, it is necessary to

[1] For the views of Frederick and Matthew Davenport Hill, see Wines, 217, etc.

[2] Wines, p. 220, etc.

[3] The modern reform of the criminal law is not the first attempt known to history at a mitigation of punishment. The Classical Chinese books condemn excessive corporal punishment as an innovation (Shoo King, xxvii. 3), and represent the practice of composition as a measure of mercy. It has, unfortunately, a darker side. (See Legge, note, pp. 608–9.) Confucius continually protests against governing the people by punishment, and declares that within 100 years a series of good rulers would be able to dispense with capital punishment. Under Buddhist influences King Asoka of Magadha abolished capital punishment, at first for certain crimes, and by the thirty-first year of his reign, altogether. (Duncker, iv. 535.) In the tenth and eleventh centuries a wave of feeling against capital punishment passed over Europe, but the feeling was religious rather

push the new method through and to treat the criminal throughout as a "case" to be understood and cured. We touch here the scientific conception underlying the modern theory of punishment. Crime, like everything else that men do or suffer, is the outcome of definite conditions. These conditions may be psychological or physical, personal or social. They arise in the character of the agent as it has grown up in him from birth in interaction with the circumstances of his life. We may recognize them in social surroundings, in overcrowding or underfeeding, in the sense of despair produced by the denial of justice, or in the overweening insolence of social superiority. But whatever they may be, if we wish to prevent crime, we must discover the conditions operating to produce crime and act upon them. This does not destroy, but defines personal responsibility. The last link in the chain of causation which produces any act is always the disposition of the agent at the time of action, and unless dominated by ungovernable impulse,[1] this disposition is always modifiable by the introduction of a fresh motive as a weight in the scale. But though not destroyed, responsibility is transformed by science, and with it the whole conception of punishment.[2] When a wicked act was held to be something

than humanitarian, and allowed the substitution of savage mutilations. Hence the Conqueror's edict, "Interdico etiam ne quis occidatur aut suspendatur pro aliqua culpa, sed eruantur oculi et testiculi abscidantur." (Pollock and Maitland, i. 88, ii. 461.) The exchange was doubtful gain, and without legislation death resumed its place as the penalty for felony by the thirteenth century. Clerks continued to have difficulties of conscience as to drawing up capital sentences and avoided writing the decisive words, and the tradition, as every one knows, persisted through the great days of the religious Inquisition. What distinguishes the modern movement is that it rests neither on the mere sentiment of mercy, nor on any theory of the intrinsic wickedness of the taking of life, but on an attempt, however imperfect as yet, to render a scientific account of the causes of crime and the effects of punishment, both on the criminal and on society at large.

[1] This makes no exception to the general statement that character is the cause of action, since that paralysis of the will which leaves a man the sport of impulse is itself a matter of character. As to control of man's conduct by heredity much nonsense is talked. Heredity is not a force controlling a man from without, but a short expression for the supposed antecedent causes of the qualities which make him what he is, and by what he is, he is to be judged, so far as he is judged at all.

[2] Responsibility, properly understood, is definable as the capacity to be determined by an adequate motive. A man is responsible who knows what is expected of him, understands the consequences of his action, and is determined therein by that knowledge. Reward and punishment, praise

arising in a spontaneous arbitrary manner from the unmotived evil choice of a man, the vindictive retribution which is founded on instinct and fostered by the needs of early society seemed amply justified. When good and evil alike are seen to grow out of assignable antecedents by processes which calmly judging men can pretty closely foretell, to rest on laws of growth and disease which apply to character as other laws apply to the physical organism, to express the lack of imagination or low power of reasoning which makes men hard, cruel and unjust, or to flow from the over-excitement or insufficient satisfaction of physical impulses that makes them a prey to lust or alcohol, then every thinking man is made to feel in a new sense that but for the grace of conditions which he has only very partially and imperfectly controlled, there where the criminal passes to disgrace and misery goes he himself, the juryman, the judge, the newspaper reader who explodes in satisfaction over the swinging sentence. No one can fully face the problem of responsibility and become, however dimly, aware of the multitudinous roots from which character and conduct spring, without feeling the utter inadequacy of the retributive theory of punishment. Vindictiveness has its natural sphere in the stage at which crime is only known as an injury to be revenged. As soon as it becomes a wrong act to be punished, the nature of wrong and the meaning of punishment have to be re-considered. If the first principle of rational ethics is that action can only be justified by doing good to those whom it affects, this principle receives a striking confirmation from the one quarter in which its application might seem doubtful. For a natural impulse makes us desire to harm the wicked, but the history of criminal law and the philosophical analysis of responsibility combine to prove to us that this is the impulse of the old Adam and not warranted by reason or justice. Justice, in punishment as in other things, seeks the good of all whom it affects, of the criminal as of the injured party. Yet all true punishment inflicts pain, for precisely the truest punishment consists in the full realization of the character of what one has done. This realization, with all the

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and blame, are therefore justly awarded in so far as they affect action. Beyond this, retribution is inapplicable, and praise and blame pass into admiration and pity.

mental misery that it involves, we may justly wish to be the lot of every criminal, whether convicted or unconvicted, whether despised or, like the greatest offenders, honoured by the world. So far pain is rightly attached to wrong-doing as, ethically speaking, its inevitable consequence. But any other sort of pain, any physical suffering that has no such healing moral effect, may gratify an animal thirst for vengeance, but has no solace for our moral thirst for the triumph, even in the mind of the wrong-doer, of the righteousness which he has set at naught.

The modern state upholds its members in the enjoyment of their rights and gives them redress for injuries to themselves in the civil courts. It also intervenes on its own motion to maintain public order by the punishment of law-breakers. Religious and political offences falling into the background, legal offences tend to be restricted to criminal acts, and punishment to be proportioned to the imputed degree of moral guilt.[1] But this ethical view of punishment, when pushed home, compels the admission that the individual theory of responsibility is no more final than the old collective theory, and punishment is compelled to justify itself by its actual effect on society in maintaining order without legalizing brutality, on the criminal in deterring him or in aiding his reform, in both relations as doing good, not as doing harm. The criminal, too, has his rights—the right to be punished, but so punished that he may be helped in the path of reform.

Briefly to resume the main phases in the evolution of public justice, we find that at the outset the community interferes mainly on what we may call supernatural grounds only with actions which are regarded as endangering its own existence. Otherwise justice, as we know it, in the sense of an impartial upholding of rights and an impartial punishment of wrong-doing, is

[1] The converse proposition that wicked acts are all treated as legal offences does not follow, nor is it true of the modern state. The questions as to the sphere of the state which arise here cannot be dealt with on this occasion.

Offences against the public order do not constitute an exception to the statement in the text. In themselves they are slight offences, and the penalty is always light, but the deliberate defiance of the public order is of course an immoral act unless justified by some bad end which that order may be made to serve.

unknown. In place of that we have at the outset purely private and personal retaliation. This develops into the systematized blood feuds of consolidated families and clans. At this stage responsibility is collective, redress is collective, intention is ignored, and there is no question of assessing punishment according to the merit of the individual. When retaliation is mitigated by the introduction of money payments no change in ethical principle occurs. It is only as social order evolves an independent organ for the adjustment of disputes and the prevention of crime, that the ethical idea becomes separated out from the conflicting passions which are its earlier husk, and step by step the individual is separated from his family, his intentions are taken into account, his formal rectitude or want of rectitude is thrown into the background by the essential justice of the case, appeals to magical processes are abandoned, and the law sets before itself the aim of discovering the facts and maintaining right or punishing wrong accordingly.

The rise of public justice proper necessitates the gradual abandonment of the whole conception of the trial as a struggle between two parties, and substitutes the idea of ascertaining the actual truth in order that justice may be done. That is at first carried out by supernatural means, viz. by the Ordeal and the Oath. These in turn give way to a true judicial inquiry by evidence and rational proof. The transition occurred in England mainly during the thirteenth century, the turning point being marked by the prohibition of the Ordeal by Innocent III. in 1215. The early stages of public justice administered by the recently-developed central power led to excessive barbarity in the discovery and punishment of crime. It took some more centuries to prove to the world that efficacy in these relations could be reconciled with humanity and a rational consideration of the best means of getting at truth. By so long and roundabout a process is a result, so simple and obvious to our minds, attained.

We have thus dealt briefly with the development of the state organization for the maintenance of rights and the suppression of wrong-doing. We have now to consider the development of the principal rights to be maintained. In a large measure these

group themselves in accordance with the main divisions into which human beings fall—divisions of sex, of community, of class, and so forth—and these divisions will guide us in the chapters now to come. Nothing so intimately affects the standard of obligation or throws so much light on the manner in which rights and duties are conceived as the degree in which they are affected by such distinctions. These will accordingly form the subjects of the three following chapters. There will remain certain general obligations, principally those arising out of rights of property, which will require separate treatment.

APPENDIX TO CHAPTER III

PUBLIC JUSTICE IN PRIMITIVE SOCIETY

THE question how far anything of the nature of public justice as opposed to vengeance is to be found in primitive society is carried a step further by the recent investigations of Dr. Westermarck (*Origin and Development of the Moral Ideas*, vol. i. pp. 170–175, etc.). A large number of peoples are instanced among whom in one form or another the community or its representatives are concerned in the maintenance of order and the punishment of wrongs. Dr. Westermarck's researches are so exhaustive that when we have examined his instances we may be pretty confident that very few will remain in extant works on anthropology to take into account. It is therefore of interest to look into the cases which he adduces and examine how far in each public justice has grown, how far the opposite principle of private redress persists, and how the two principles are affected by the political constitution of the tribe and its position in the scale of culture.

It must be borne in mind that much of the information which we derive from travellers consists of very casual observations by men familiar with European justice, but with no knowledge of primitive custom. To such observers any collective action might appear as an execution of public justice, though in reality it might be taken by a family or clan in prosecution of a feud ; conversely the slaying of a man in revenge might appear to them merely as a murder, and fail to draw their attention to the existence of a regular custom of blood revenge ; while lastly they may easily state that "offences" are punished by the tribe without drawing those distinctions between public offences endangering the community and private wrongs which more thorough observers find to be of importance.

Thus among the Narrinyeri of Australia "all cases of infraction of law or custom were tried by the Tendi," a meeting of the elder

natives of the clan or group. This we learn from Mr. Taplin.[1] Mr. Howitt (*Tribes of S.E. Australia*, p. 341) states on Mr. Taplin's authority that public offences were punished by blows on the head, but he adds "I was not informed by Mr. Taplin what he included in the term public offences." Unfortunately this is precisely the point on which we require information. We are fully prepared to find that the Narrinyeri treat such offences as incest and killing by magic as punishable by the group collectively. The question is whether they include other forms of homicide and personal injuries in the same category. In the instance which Mr. Taplin gives of a combined Tendi, it appears that one clan was accusing a member of another of homicide, and a palaver ensued which finally ended without any decision.[2] This is clearly not an instance of impartial public justice, but of an accusation brought by the group of the sufferer against that of the alleged aggressor, resulting in a palaver instead of in a battle. That is to say, it appears as one of the various forms of mitigated blood feud.[3]

Sometimes blood vengeance is satisfied by submission to an ordeal of spear-throwing. Thus among the Wotzobaluk in case of an offence by a member of another local group the man is summoned to the ordeal. The two groups confront each other and the ceremony may end in a general fight. (Howitt, p. 334.) A similar ceremony is in use in S. W. Victoria (*ib.*, p. 335), and with this we may connect the statement of Dawson (*Australian Aborigines*, p. 76) that "persons accused of wrong-doing get a month's notice to appear before the assembled tribes and be tried, on pain of being outlawed and killed." If found guilty of a private wrong, we are told, the accused "is painted white," and along with one of his brothers—this, of course, on the principle of collective responsibility—undergoes the ordeal of spear-throwing. "As blood must be spilt to satisfy the injured party the trial ends on his being hit" . . . "If the accused

[1] Woods, *Native Tribes of S. Australia*, p. 34; Westermarck, pp. 175, 294.

[2] Taplin speaks of a distinction being drawn between murder and manslaughter, but he also says, "I cannot give the natives credit for much order. . . . There was a tremendous amount of talk. Sometimes one would speak, then half-a-dozen would speak together. . . . I could not make out the drift of the discussion." This being so we can hardly quote this evidence as proof of a nice discrimination of degrees of responsibility among the Narrinyeri.

[3] The tribe or group whose member is accused, of course run the risk of a feud if they stand by him. They may accordingly discuss the case among themselves or in palaver with the aggrieved tribe. Out of such discussions a trial might be evolved, but in themselves they are motived by and subordinate to the exercise of vengeance by another group.

person refuses to appear to be tried, he is outlawed and may be killed; and his brother or nearest relative is held responsible and must submit to be attacked with boomerangs. If it turns out that the man was innocent, the relatives have a right to retaliate on the family of the accuser on the first opportunity." Clearly in all this we have another ceremonial mitigation of the blood feud, with the characteristics of vicarious responsibility, satisfaction by bloodshed and retaliation.[1] Mr. Dawson goes on to say that "should a person, through bad conduct, become a constant anxiety and trouble to the tribe, a consultation is held and he is put to death." Here again, unfortunately, the precise grounds are not stated. But by the tribe Mr. Dawson appears to mean what Messrs. Spencer and Gillen call the local group. (Its numbers in former days averaged probably 120, but now consist of a few individuals.) The justice which it executes on its own members is therefore comparable rather to the domestic justice of the enlarged family or small clan than to the public justice of a tribe or political community. Mr. Dawson's expressions would seem to indicate merely that individuals involving the group in trouble are liable to be thus dealt with, and a similar idea is implied in his account of the thrashing of liars who get others into trouble (p. 76). On the whole in this case we appear to have (1) some sort of rough justice within the local group, and (2) as between the groups, the blood feud, for which a ceremonial spear-throwing may be substituted.

The ordeal of spear-throwing in the arm to expiate death is also mentioned in an account of the tribes of Adelaide and of the Murray River by Eyre,[2] who says that otherwise he is not aware of any stated punishments, and that vengeance is executed by the friends of the injured party. He contrasts this with the practice in W. Australia, where he says, quoting from Captain Grey, that crimes may be compounded by the spear-throwing ordeal.[3]

This same ordeal of spear-throwing appears in Collins's account of the New South Wales natives in yet another light, as a ceremony to which the relatives of a dead man were subjected apparently in satisfaction to the spirit.[4]

[1] In fact, on p. 70, Mr. Dawson, after describing the blood feud which is in full swing among these people, explicitly states that if the murderer escapes he is cited as above described.

[2] *Central Australia*, ii. p. 388, referred to in Westermarck, p. 171.

[3] He also speaks of having heard from the natives of New South Wales of a similar practice.

[4] "On the death of a person male or female, old or young, the friends of the deceased must be punished, as if the death were occasioned by their

Another form of mitigated vengeance is the duel regulated by the tribe or group. This plan was found among the natives of North-West Central Queensland by Roth. Here if the victor kills his man and is held to be in the wrong, he may be slain, unless indeed the (tribal) "brothers" on each side take up the quarrel, when a general mêlée ensues. Moreover, if the deceased is not a member of the "tribe" (which again means the local group numbering anything from a score or two to 200), the homicide will not be punished till the tribe of the deceased demands vengeance. In that case the man may be delivered up to the spear-throwing ordeal, and a second victim may be demanded along with him. In this case we trace (1) the attempt in the regulated duel to mitigate quarrels, (2) the definite distinction between the smaller and larger group. The small group is not concerned with the killing of any member of another group, though they are in constant intercourse, except so far as it may expose them to hostile action.[1]

Even within the smaller group private wrongs are not always righted by the direct coercive authority of the group. Thus, speaking of the Bangerang tribe, Mr. Curr notes the absence of any authority outside the family circle. The ruling male was, however, submissive to the custom of the tribe, and Mr. Curr distinguishes the two cases of transgression—those which had a "foreign aspect" and involved the "tribe" in wars, and those within the tribe. For wrongs within the "tribe," custom appointed penalties; the injured party could appeal to his fellow tribes-men and women. The camp would express its view, and the accused would accept the penalty.[2] Yet we are not dealing with a court possessed of executive powers, for Mr. Curr adds, "Had an offender refused satisfaction, he would probably have been murdered by the injured party and no one would have avenged his death." That is to say, even within the group public justice goes no further than to countenance the avenger.[3]

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neglect." (Collins, *New South Wales*, p. 586, ref. Westermarck, 171.) That the motive is not punishment in our sense, but to give the deceased blood for blood, is evident from the remark of a native, Bennilong, when his wife died, that he should not be satisfied till he had sacrificed some one to her manes; this also appears in the vicarious vengeance described by Collins.

[1] Roth, *North-West Queensland*, p. 141; Westermarck, 171. In this case, however, there is also distinct collective action for the maintenance of order in the camp by the assembled groups—murder, incest, and the use of weapons within the camp being punishable.

[2] *Squatting in Victoria*, 244, 245 (referred to in Westermarck, 171).

[3] When Mr. Curr states elsewhere (*Australian Races*, p. 61) that if a man persisted in disregarding custom he would be put to death or have to exile himself, a more direct collective action is indicated, but its limits

A quite distinctive mitigation of the blood feud in a peaceably-disposed people is seen in the nith songs of the Greenlanders. A man would challenge any one who had injured him to a contest of song at a meeting of the tribe. "The litigants stood face to face with each other in the midst of a circle of on-lookers, both men and women, and beating a tambourine or drum, each in turn sang satirical songs about the other. . . . They related all the misdeeds of their opponent and tried in every possible way to make him ridiculous. The one who got the audience to laugh most at his gibes or inventions was the conqueror." (Nansen, *Eskimo Life*, p. 186, etc.) This is not the description of a trial, but of a regulated duel, only a duel of wits, a substitute for the serious blood vengeance which persists, though in a mild form. For murder, we are told, is regarded as a purely private affair for the murdered man's nearest relatives to take up. There are, however, cases of extreme atrocity in which a village has been known to make common cause against a murderer and put him to death, and, as usual, we learn that to kill old witches and wizards is not considered criminal. (*Ib.*, p. 162.) The normal blood feud is varied by occasional outbursts of public resentment.

In many cases where a settlement of disputes by a council of elders, or a chief, is spoken of, we find on further examination that this method is merely subsidiary to that of self-help and private vengeance. Thus among the Nagas, Stewart (*Journal As. Soc. of Bengal*, p. 609, Westermarck 174) certainly tells us that petty disputes and disagreements about property are settled by a council of elders, the litigants voluntarily submitting to their arbitration. But he goes on to say that, correctly speaking, there is not a shadow of constituted authority. It is true there is general peace. But this is founded on revenge, and the prosecution of it to the extremest lengths for the most trifling offences—and this not only as between different villages, but as between two members of the same village.

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are left very vague. One reason for such action is suggested by the remark that a man would be prevented from killing his wife on the ground that her brothers would kill the first of his blood whom they might get hold of. This is the "foreign" consideration again. Mr. Curr notes at the same time a great indisposition to any interference. Direct public punishment of a private wrong is more distinctly indicated among the Victorian tribes by Le Souet (Brough Smith, *Aborigines of Victoria*, p. 295), who says that any theft or breach of tribal usage is generally inquired into and punished by the leading men of the "tribe"—by which he seems to mean the local group, as he speaks of each tribe as confined to its own territory and mentions two tribes with thirty men in each. He also (it should be noted) describes persistent blood revenge (p. 289 ff.).

In the rare event of a quarrel breaking out between two men of the same village, each has his party who "takes up his quarrel not by any means from a sense of justice, but from relationship—and a civil war ensues which is disgusting to contemplate." In such cases as this it would be very misleading to speak of justice as administered by a court as we conceive it. The function of the council is clearly to maintain the peace if possible, but the real basis of order is the blood feud and the fear of it.

The "justice" of a chief is often of the same subsidiary kind; thus among the Brazilians, von Martius tells us (*Beiträge zur Ethnographie Amerika's*, i. p. 59, etc.) that the chief hears the rare cases of dispute, associating with himself the sorcerer and medicine-man; that in grave cases whole families with their supporters come before him, that he tracks a thief and enforces restitution, and perhaps the punishment of wounding in addition (p. 81, W. 173). But looking further we find that in these tribes blood revenge is in full swing. There is no punishment for killing a man in a quarrel. Revenge is purely an affair of the family. It is only when death or injury is inflicted by a member of another tribe that the community takes the matter up. Vengeance is collective and spares neither children nor the aged. Where, then, is the chief in all this? He seldom meddled, we are told, in cases of homicide within the community, but there was no rule in the matter. He might seek to appease the feud by getting the parties to accept composition, but probably this would only be accepted in the case of somewhat distant relatives (pp. 130, 131). Smaller quarrels were generally fought out, and it was thought discreditable to bring them to the chief.

In this case, then, the public authority as focussed in the chief is seen acting intermittently for the appeasement of strife by the well-known expedient of "composition." But in the background as, before, lies the blood feud.[1]

Higher up in the scale we find numerous instances in which the function of the court is to enforce composition. Blood revenge may be formally prohibited, but is still a custom regulated by recognized rules (*e. g.* the Ondonga.) It is perhaps confined to cases of homicide

[1] In the category of cases where "public justice" is distinctly subsidiary to the blood feud I should rank the Bangerang (p. 125 above), probably the Narrinyeri (p. 122), the Brazilians (above), the Nagas (above, pp. 126, 127), Kondhs (Macpherson, *Service in India*, p. 81, etc.), Teda (*Nachtigal, Sahara and Soudan*, i. 448, 449), Yuin (Howitt, *S.E. Australia*, p. 342), and probably the Wanika (Burton, *Zanzibar*, ii. p. 94), though the account is somewhat confusing.

(*e. g.* the Bakwiri), or to deliberate murder, accidental homicide being compoundable (Banaka and Bapuku). It persists side by side with public justice, the practice of composition being the mediating term. (Marshall Islanders, Kohler, *Z. f. V. R.*, xiv. p. 448 ; Herero, *ib.*, p. 316.)[1] The conception of crime as essentially an offence against property (whereby *e. g.* the essence of homicide is that it deprives a father or widow of a protector or helper) is apparently an offshoot from the same stock of ideas as the practice of composition. We find this principle among the Basutos (Casalis, p. 224), and in large measure it determines the form of public justice among the Kaffir peoples generally, though to understand its operation we must add that the persons of the tribesmen are generally considered as the property of the chief.[2]

In some cases where courts now exist, or existed at the time at which our witness wrote, there is direct evidence of an earlier system of revenge. *E. g.* among the Creek Indians we read in Schoolcraft (i. 277) that formerly a homicide was avenged by the nearest relative, but now the accused undergoes a regular trial before the chiefs. We are therefore fully justified in regarding cases like that of the Iroquois (Morgan, *League*, p. 330), where the murderer is given up to the vengeance of the family, as indicating a survival of the regular blood feud.[3]

[1] Among cases where the public intervention may be regarded as a mitigation of vengeance I would place the Queenslanders, New South Wales Tribes, Western Australians, Western Victorians (above, pp. 123–5), Eskimo (above, p. 126), Murray Islanders (Hunt, *J. A. I.*, 28. 6), Rejangs (Marsden, pp. 217, 246), Waganda (Steinmetz, *Rechtsverhältnisse*, pp. 193–200), Herero (Kohler, *Z. f. V. R.*, xiv. 316), Wagogo (Steinmetz, 214), Baronga (Junod, 157, 158), Basutos (Casalis, p. 224), Kita district (Steinmetz, 174, 175), Washambala (Steinmetz, 253–261), Msalala (*ib.*, 279, 280), Bataks (von Brenner, 211–213), Wyandots (Powell, *Bur. Eth.*, 66, 67), Ondonga (Steinmetz, 340–2). I would include in this class all cases in which composition is a prominent institution. The boundary line between this and the last class, however, is not always clear. We may perhaps add tribes of Victoria (above, p. 125) and New South Wales (Fraser, *Aborigines of N.S. Wales*, pp. 38, 39).

[2] On this basis the Kaffir peoples built up a classification of offences roughly corresponding to the civilized distinction between criminal and civil law. (See above, p. 100, note).

[3] Among the Ainu, the power of chief and elders appears to have superseded an early stage in which each family chief was independent. (Batchelor, p. 278.) In the Caroline Islands, the chief is said to administer justice according to the strictest principles of relation. (Von Kotzebue, *Voyage of Discovery*, iii. p. 207). The Sonthals formally had a system of single combats. (Man, *Sonthalia*, 90.) Among the Mishmees, a council of chief hands over the homicide to the nearest male relative. (T. Cooper, *Mishmee Hills*, p. 238.)

Thus in a variety of ways public intervention in the cases before us stands in close relation to the system of private vengeance. Further, the pivot on which it turns is in a large proportion of peoples the authority of the chief. The relatively high development of this authority enables the chief to maintain order and enforce punishment in some further cases where the authorities cited by Dr. Westermarck do not speak of any system of revenge. Some of the peoples cited in this connection are almost to be called semi-civilized —*e. g.* the Mandingos and other negro states. There are, however, some of lower grade—*e. g.* the Aleuts, the Hottentots,[1] and even one or two Australian tribes.[2]

There remain a few cases in which in the absence of an authoritative chief a primitive court is said to administer justice. Some of the statements, however, are so vague that after what has been seen of the misunderstandings incident to this question they must be regarded as of very little value if taken as proof of the supremacy of public justice and its independence of a system of revenge. For example, of the Kubus of Sumatra, Forbes writes :—

"Leading so nomadic a life the jurisdiction that can be exercised by any one over them can be but very slight. Such as it is, it is wielded by the elders of the party, who settle disputes that arise between man and man and inflict punishment for offences."

This summary statement does not answer any of the questions suggested by the analysis that we have made of other instances of "public justice." For all that appears to the contrary the case may resemble that of the Nagas. Indeed it might fall into almost any of the categories which have been distinguished.[3]

[1] Here, however, according to Kohler, there are evidences of an earlier period of blood revenge.

[2] *E. g.* The Gounditch Mara (Fison and Howitt, p. 177). Here the chief's office was hereditary ; besides settling disputes, he could compel all the tribesmen to follow him in war, and they were under obligation to make presents to him. Other cases in which justice depends on the power of the chief are the Kukis (Dalton, *Ethnology of Bengal*, p. 45), Solomon Islands (Codrington, *Melanesians*, p. 345), Bowditch Islands (Lister, *J. A. I.*, xxi. 53), some of the Marshall Islands (Kubary, *Museum Godeffroy*, I., i. 37), Pelew Islands (*Ib.*, I., iv. 42), Waganda (Steinmetz, 193–200), Barotse (Decle, *Three Years in Savage Africa*, pp. 70–74), Marutse (Holub, *Seven Years in S. Africa*, ii. p. 314), Bechuana (Kohler, xv. p. 333), Shilluk (Beltrame, *Fiume Bianco*, p. 77), Ovambo (Andersson, *Lake Ngami*, p. 197), Mambuttu (Casati, *Ten Years in Equatoria*, i. p. 163), Fida (Bosman, *Coast of Guinea*, p. 331). To these may be added the Soulimana (Laing, *Travels*, p. 365), and Mandingos (Mungo Park, p. 22, in Cassell's edition). These are peoples of relatively high social organization.

[3] Much the same may be said of Casati's account (*op. cit.* p. 158) of the Akkas.

There remain a few cases in which the decisions of a council appear to be taken as final. Thus among the Todas, a pastoral tribe of peaceful habits carrying no weapons, questions of right and wrong are settled by a "Punchayet" or council of five, whose decisions are considered binding. We are told that this system of adjudication obtains in all parts of Southern India. Among another hill tribe, the Bygas, serious crime is almost unheard of, and nearly all disputes are settled by the elders without appeal, and this though they are "certainly the wildest" of all the races mentioned by our authority. (Forsyth, *Highlands of Central India*, p. 361.) Even in these cases, however, it is possible that contact with civilized rule has made some difference, for of the Sonthals, another hill tribe, we learn that they too take all disputes before the elders; that if redress is refused they go before the District Commission; that they have the tradition, that formerly disputes between males were settled by single combat, which was always fatal to one party. The custom, we are told, has disappeared as equitable methods of settlement have been brought to them. In fact, the British court now supplies the coercive power, for which formerly each man had to rely on his own right-arm.

Besides the Todas and Bygas, the Tagbuana (Philippine Islands), Old Kukis and Wakamba are peoples among whom public justice is exercised by some sort of court. These seem to be the only cases in which, in the absence of an authoritative chief, we find a system of the public punishment of private wrongs, unentangled with the custom of private vengeance,[1] and of these the Wakamba are somewhat advanced people who have, exceptionally, avoided the despotic form of chieftainship (Dech, *op. cit.*, p. 485, etc.), and the Tagbuana are thought to be degenerate from a higher civilization. (Worcester, *Philippine Is.*, pp. 991, 100.)

The cases of public intervention, then, appear to fall into the following categories. We have—

(1) The punishment of offences held to constitute a public danger.

(2) Public intervention in anticipation or mitigation of private redress.

(3) The maintenance of order by a chief.

(4) Public justice independent of any of these conditions.

[1] To these should perhaps be added the instances of the Queensland and New South Wales tribes (above, p. 125, note 1; and p. 128, note 1), in which some private wrongs are punished collectively, and the collective punishment stands side by side with the blood feud, without being demonstrably connected with it. On the case of the Victorians see next note.

Cases of this last kind appear to be very rare in primitive society.

In saying this we are not taking the domestic justice of the enlarged family or little clan, constituting the smallest social unit, into account. Unfortunately the study of savage custom yields somewhat vague information on this head, but from what evidence we possess, we may infer that this form of justice is somewhat irregularly developed.[1] Nevertheless we can conceive of it as flourishing within each social unit, while the relations of the units, though for many purposes they act together and form one society, are still regulated by the custom of vengeance.[2]

To the Australian tribes in which there is some sort of public intervention in mitigation of the blood feud, could be added a considerable list from Mr. Howitt's work—the Dieri, Southern Kamilaroi, Wiradjuri, tribes of Maryborough, Turrbal, Wotjobaluk, South West Victorians, Wurunjerri, Bunurong, Gea-wegal, Kurnai. Among many of these there are public punishments for public offences only. Mr. Howitt sums up the evidence for the large number of tribes which he surveys as follows:—

"It will be evident that a distinction is drawn between offences which merely affect the individual, and are therefore left for him to redress, and those which may be called tribal offences, such as murder by evil magic, breaches of the exogamous law, or revealing the secrets of the initiation ceremonies. Such offences were dealt with by the elders and their leaders, the Headmen of the tribe."

This account, in which Mr. Howitt has taken into consideration much of the Australian evidence given above, closely corroborates the classification of public offences given by Steinmetz—witchcraft, incest, treason, sacrilege.[3] To these normal cases Steinmetz adds a few sporadic instances in which particular offences are visited with public punishment, though private vengeance is otherwise the rule.[4]

[1] See Steinmetz, ii. pp. 165, 166.

[2] A case like that of the Victorian tribes, where crimes within the local group are punished, may perhaps be classed as instances of "domestic justice." In Australian society, the petty local group corresponds rather to the enlarged family or petty clans of other peoples, than to the tribe or community as a whole.

[3] Steinmetz, pp. 327–340.

[4] It is remarkable that adultery and seduction, etc., which generally tend so strongly to remain in the sphere of vengeance, are the offences mentioned in three or four cases. (*Caribs*, *Caledonians*, etc., *op. cit.*)

Our conclusions on the whole question of the development of public justice in primitive society will depend on what we mean by "public" and what we mean by "justice." If by "justice" we mean any sort of action taken for the adjustment of disputes or the punishment of offences, we give the conception a relatively large extension. If we mean the impartial and coercive action of a constituted authority, acting upon rational investigation for the maintenance of all members of society in their rights, and the punishment of wrong-doers in accordance with the degree of their responsibility, we shall find our conception realized far more rarely. By "public," again, we may mean the combined action of any body whatever, or we may distinguish as informal or domestic the action of the smallest unit of society, such as the enlarged family, and regard as "public" only the concerted action of the whole body of those who, living in regular, permanent or recurrent social relations (like those between different clans in a village or the groups in an Australian tribe), may be considered as forming one society.

Having these distinctions in mind, we may conclude from our evidence that while domestic justice may flourish at very early stages, though its development, in fact, appears to be irregular, public justice in any wider sense appears to develop independently in relation to offences which either on magical or political grounds are held to constitute a public danger; that in other relations it takes the form of an endeavour to adjust in a friendly manner disputes that will otherwise lead to a quarrel, and gains importance and coercive power, generally speaking, with the advance of society and the growing authority of the chief; that it is very rare in savage society for public justice to be found to the exclusion of vengeance, and that in the majority of cases where it is alleged to be found, it depends on the authority of the chief. The cases in which the public maintenance of order has succeeded in extruding private vengeance except through a chieftain's powers, appear to be very rare indeed in the savage world.

This does not imply that justice grows out of vengeance. On the contrary, an element of public feeling is found in more than one relation from the beginning. Probably its growth is due as much to the extension of the conception of public offences, as to the mitigation of the blood feud, and at a certain stage of advance the two ideas become blended together. But at the lowest stages the collective intervention is limited to a few acts held in horror, and conceived as dangerous to the common weal, while private rights

are left to private protection, and neither public nor private vengeance regards the moral responsibility of the individual. It is the binding together of these three elements, the common good, private rights, and moral responsibility, which determines the rise of public justice.

CHAPTER IV

MARRIAGE AND THE POSITION OF WOMEN

1. THE division of the sexes affects the standard of conduct in two ways. First, it gives rise to special relations, carrying with them special rights and duties. Secondly, it cuts every people into two portions, and the legal and ethical position of these two portions is never wholly the same. In greater or less degree the rights and the duties of men and women differ, and the divergence is not confined to matters arising directly from the sex relation itself. Important as these differences are for an understanding of ethical conceptions, they are themselves extremely difficult to ascertain and interpret. In no other department of ethics are the types of custom strewn in such disarray over the various stages of culture. Nowhere else is it so difficult to classify without bewildering ourselves by cross divisions. Nowhere else is a bald statement of the law so likely to mislead as to actual practice or living sentiment. For no other human relation is at once so personal, and so bound up by multitudinous threads with the forces and ideas, economic, religious and even political, which go to determine the structure of any society.

The position of woman is not wholly to be judged by her condition as wife and mother. Often the unmarried woman has important rights which marriage takes away; often also the married woman acquires a degree of freedom and dignity which her unmarried sister lacks. Nor conversely is the position of the wife the sole question of importance in the law of marriage. Nevertheless the two questions are too nearly allied for separate treatment, and in order to understand the position of women

we must pass at once to a general consideration of the law and customs relating to marriage.

It will help us to begin by distinguishing the principal questions to be asked about the marriage customs of any society. Thus we may classify marriage:

(1) According to the number of parties to the union (monogamy, polygamy, etc.).

(2) According to the restrictions on marriage (exogamy and endogamy).

(3) According to its stability (law of divorce).

(4) By the methods of obtaining a husband or wife (*e. g.* capture, purchase, contract).

(5) By the relations between husband and wife (in the family).

The two last questions are closely related, and both have an important bearing on the general position of women. Under each head we shall see what are the principal forms of marriage customs that exist, and which are the prevalent types in the savage and barbaric world. We shall then briefly trace the history of marriage and of the position of women among civilized peoples.

2. I. We have to ask first in any community, who, or rather how many, are the possible parties to a marriage. Is it (*a*) a union of one man with one woman, or (*b*) of one man with two or more women, or (*c*) of two or more men with one woman, or (*d*) of a group of men with a group of women, or (*e*) is it wholly irregular, the negation of union, promiscuity? All these are types of marriage which exist or have existed, or at least have been alleged to exist. Further they split up into sub-types. Polygyny, for example, the union of one man with two or more women, is found in the two fairly distinguishable types of polygamy proper, in which several women are alike wives, and concubinage, in which there is one chief and fully legitimate wife, and one or more in a subordinate and perhaps servile position.[1] The

[1] In China there is only one chief wife. The others are secondary, but legitimate wives. The old Babylonian law recognizes one wife (allowing a second in case of her being invalided), with concubines who were to recognize the wife as mistress. The case of Leah and Rachel illustrates a family in which there were two legitimate wives as well as concubines. Mussulman law allows four legitimate wives and an indefinite number of

one type, moreover, shades off into the other by gradations according as the chief wife's position is more or less fully defined,[1] and as that of the secondary wives is more or less servile. Polyandry, again, though far less common than polygamy, has many varieties. The several husbands may, and in the commonest case do, form a definite group. Generally, as in the well-known case of Thibetan marriage, they are all brothers.[2] But this is not always so. Polyandry may merely take the form of permitting a woman to have many husbands without specifying any particular relationship between them except such as may follow indirectly from the other marriage regulations of the community. This is the case among the Nairs of the Malabar coast. The same people illustrate a still further variety, the combination of polyandry and polygamy. For as the Nair woman may have many husbands, so the Nair husband may have many wives.[3] Again, in the relations between the husbands

concubines. The old Japanese law recognized polygamy with a head-wife. (Post, i. 62; Kohler, *Z. f. V. R.* vi. p. 369.) For instances among uncivilized peoples, see Howard, i. pp. 143-4, and Westermarck, p. 442, etc., and *Cambridge Anthropological Expedition to the Torres Straits*, p. 230.

[1] In some cases a second wife may only be taken if the first is childless, *e. g.* among peoples of the Punjab and the Dekkan, the Santals in Bengal, some Bombay tribes. (Post, *l.c.*) Post also refers to Bulgarian and Montenegrin customs.

Among the Malays, under the Semando form of marriage, the taking of a second wife is a ground of divorce, and at Mokomoko the husband must pay her a fine, 40 gulden. (Waitz, v. 145, 146.) Among the Khonds the wife's consent is required. (Reclus, *Primitive Folk*, p. 281.) Post gives similar instances among the Khyengs, the Tamils of Ceylon, and Punjab peoples (Post, i. 63, from Kohler, *Z. f. V. R.*, vi. p. 192), and Howard (i. p. 144) quotes a case among the North American Indians. Among the Touaregs the taking of a second wife is a ground of divorce. (Letourneau, *La Femme*, p. 308.)

[2] Among the Todas the wife belongs to the elder brother, but the younger brothers also have rights over her as they grow up, and an extra lover is permitted as well. (Reclus, p. 196.) Polyandry is, however, disappearing except among the indigent. According to Westermarck (p. 453) there are only three cases in Asia in which polyandry is not limited to brothers—viz. the Nairs, Khasias, and certain Cossacks, but Letourneau (*La Femme*, p. 216) denies that it is strictly limited to brothers in Thibet.

[3] Compare Cæsar's account of the ancient Britons: "Uxores habent deni duodenique inter se communes, et maxime fratres cum fratribus parentesque cum liberis; sed, si qui sunt ex his nati, eorum habentur liberi, a quibus primum virgines quaeque deductae sunt." (*B. G.*, v. 14.) That is, there was a chief husband and the rest were secondary. Among the polyandrous tribes of primitive Arabia the wife, according to Strabo, passed the night with the elder brother, but the others had access to her. (Starcke, p. 137.) For the Nairs, see Reclus, 162.

there are differences quite parallel to those which distinguish polygamy from concubinage. All the husbands, that is, may have equal rights, or there may be one chief husband and others inferior and secondary to him. Of such a character is the secondary husband who assumes both the rights and the duties of the proper husband in his absence among the Aleuts.[1] Some peoples have the punishment—to our eyes the very paradoxical punishment—for adultery that the paramour on detection is compelled to become a secondary husband and contribute to the maintenance of the family.[2]

3. Of group marriage, again, more than one variety is abstractly possible, though as here the evidence becomes scantier it is not so easy to say which types, if any, have been actually represented in history. Indeed it cannot be regarded as certain that any such institution as the actual marriage of two groups, as distinct from a combination of polygamy and polyandry with certain marriage taboos, has ever existed. As the whole subject is involved in controversy, it will be well to summarize what is

[1] Reclus, p. 66–67. Among the Thlinkeets and Koloshes a younger brother is preferred for this purpose. Secondary husbands occur among the Papuas. (Kohler, *Z. f. V. R.*, 1900, p. 334.)

[2] Among the Konyagas, if the paramour is a member of the husband's family the latter may compel him to obey his orders and those of the wife, with whom henceforth the association is legitimate. (Reclus, p. 67.) Altogether Westermarck enumerates some thirty-six instances of tribes practising polyandry (p. 450). To these must be added the people of Langerote and Portaventura in the Canary Islands in the sixteenth century (Letourneau, p. 303), and in antiquity the Arabs and British (Westermarck, p. 454). The case of the primitive Aryans in India is doubtful. The two Aswins in the Rig Veda win one damsel as the prize of a chariot race, and she acknowledges their "husbandship." In the Mahabharata Draupadi is won by the eldest of five Pandava princes and becomes the wife of them all, but her father describes this as "an unlawful act, contrary to usage and the Vedas." The princes plead as precedent the case of a "most excellent moral woman," who dwelt with seven saints, and of Varski, who cohabited with ten brothers "whose souls had been purified with penance." Mayne (*Hindu Law and Usage*, p. 64) points out that these were bad precedents, being cases of saints who were above ordinary laws. He adds that in the Ramayana polyandry is mentioned with abhorrence, and sums up in favour of the view that sexual looseness rather than recognized polyandry is indicated. (Mayne, p. 65, 4th ed.)

In Sparta a secondary husband was sometimes tolerated for the sake of increasing the family—*οἱ ἄνδρες (βούλονται) ἀδελφοὺς τοῖς παισὶ προσλαμβάνειν οἳ τοῦ μὲν γένους καὶ τῆς δυνάμεως κοινωνοῦσι, τῶν δὲ χρημάτων οὐκ ἀντιποιοῦνται.* (Xenophon, *Rep. Lac.*, i. 9, quoted in Grote, Part II., chap. vi. p. 520.)

actually found in a leading case. Among the Central Australian tribes two types of marriage custom have been distinguished by Messrs. Spencer and Gillen. The first which specially concerns us is that practised among the Urabunna. The tribe is divided into two classes, and these classes are exogamous—that is to say, a man must not marry within his class, but must choose his wife from the other. Secondly, there are distinct totems within the tribe, and these are similarly exogamous. Thirdly, each of the two classes is divided into four groups, and in choosing a wife a man is restricted to one of these groups. How the group division is arrived at need not concern us for the present. The point is merely that there exists for any given group of men a definite group of women with whom they may marry, and who are called their Nupas. So far, then, our result is that there are in the tribe a group of men and of women who are Nupa to each other—that is, potential husbands and wives. To come now to the actual marriage, a man will have one or more of his Nupas assigned to him as his wives. He will also have others to whom he is Piriaungaru—that is, he has access to them under certain conditions. Similarly a woman may be Piriaungaru to several men, and lastly a man may lend his wife to any of her Nupas, and on the occasion of a visit, for example, is expected as a matter of courtesy and good feeling to do so. Thus the husband has only, so to say, a preferential right in his wife, and the wife in the husband. The husband will have a secondary right to other women as his Piriaungaru, while his wives are in turn Piriaungaru to other men.[1]

[1] In the Dieri tribe there is both individual and group marriage. In the latter case the headman allots certain men and women (subject to the clan or totem restriction) to one another as Pirauru, but their rights, as the different husbands and wives are often members of different local groups, are exercised mainly when the groups meet. When they separate the right of the Noa or principal husband predominates. (A. W. Howitt, *The Organization of Australian Tribes*, Transactions of Royal Society of Victoria, vol. i., pt. ii., pp. 124–7.)

The custom of the Arunta and other Central Australian tribes is still further removed from a true group marriage, as here there are no Piriaungaru. A woman is restricted to one man unless he lends her. What suggests group marriage, apart from the nomenclature of relationships, is (1) that the name for wife is the group name Unawa, the term (corresponding to Nupa) applied to all women of the class with whom the man may lawfully marry; (2) that wives are freely lent within the group and enjoyed promiscuously at festivals. How much stress is to be laid on this

Now as it stands this scheme of marriage may be classified as a form of polyandry combined with polygamy, such as we have already met with among the Nairs, only complicated by the taboos which limit the intercourse of the sexes to the two

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is not easy to determine. It is certain that the class restrictions on marriage are held much more vital by most savages (whatever their marriage customs) than the marriage tie itself. Among the Australians Messrs. Spencer and Gillen remark that jealousy is little developed, adultery is at most an infringement of rights of property (so also among North American Indians, see Waitz, iii. p. 131), wife lending is habitual, and divorce is easy. Under these circumstances the very use of the term marriage can only be justified by the difficulty of finding any other. It is not marriage as we understand the relation, and the tie, whatever we call it, is exceedingly loose. On the other hand, the taboos which mark out special classes for each other are among the most sacred laws of the tribe. Generally speaking, these restrictions are of a negative character—a man must not marry within his totem, or his clan, but sometimes, owing to the multiplication of restrictions, particularly in the form of classificatory relationships (of which the Australian class divisions are really a case), the result is to confine the intending spouse to a specific group. This group will then consist of his Nupa or Unawa, and so it is easy for him to change his wife within the group and impossible for him to take one outside it ; and as this applies to all the men and all the women we may say that the two groups are more strictly bound together than any individuals within it, and this we may, if we please, term group marriage. But the expression is undesirable unless deliberately intended to suggest the theory of an earlier form in which men and women were actually united by groups.

The real importance of these isolated and partial illustrations of group marriage lies in their association with the classificatory system of counting kinship. In name, an Australian has not one father, but a group of fathers, *i. e.* all the potential husbands of his mother ; not one brother, but a group of brothers, *i. e.* all the sons of his potential fathers, and so on. This system of naming is widely spread in parts of the world where there is little or no trace of group marriage. Those who uphold group marriage argue (1) that this method of reckoning kinship is the only possible method where group marriage exists, (2) that no other satisfactory explanation of its origin and meaning has ever been put forward, (3) that we can understand its existence where individual marriage now prevails if we suppose group marriage to have existed previously. If this is granted it is tempting to argue further to a general theory of the origin of marriage, according to which its history would begin (1) with the temporary mating of a man and woman. This would be restricted (2) by a taboo on all women recognized as of the same blood or of the same totem—the conception of unity being in any case magical—as the man. This would yield group marriage with such imperfect individual appropriation as we find among the Urabunna, and then would develop (3) into a more permanent appropriation of certain women to a man or men. But these considerations lead into a region of hypothesis which lies outside the plan of the present work, the object of which is to analyze and compare institutions which we find, not to postulate institutions which we do not find.

Cases in which a man marries his wife's sisters or possibly certain other relatives along with her are partial developments of polygamy rather than

groups which are Nupa to each other. It is possible to explain the system as the relic of earlier customs where the two Nupa groups were actually married to each other, so that intercourse between them would be promiscuous. This, however, is an inference as to the probability of which others must determine. What we actually find is not this marriage of two groups, but exceedingly loose relations, polygamous and polyandrous, within the groups combined with strict taboo outside them.

Where the marital relation becomes very loose we approach promiscuity, or the sheer negation of marriage, as between all who are not separated from each other by any taboo. If such taboos also fail, we get complete promiscuity. Does this exist? Dr. Westermarck[1] enumerates some thirty-one cases in which it has been alleged. But in the majority of these it is also denied by other authorities, and in several the allegation is known to be false. There remain a number of cases in which the marital relation is so loose that the husband sinks into the position of a lover, temporarily visiting the woman's house and readily dismissed at will. Sheer promiscuity is probably to be regarded rather as the extreme of looseness in the sexual relation than as a positive institution supported by social sanctions.[2]

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group marriages, and the institution of the Omaha, quoted by Kohler (*Z. f. V. R.*, 1897, p. 320) as a case of group marriage, where a man marries the aunt and sister or niece of his wife, while on his death the widows pass to his brothers, is a combination of this form of polygamy with the levirate.

[1] Westermarck, pp. 52–55.

[2] The statement of Herodotus about the Massagetae (Bk. i. chap. 216) and of Cosmas of Prague (eleventh century A.D.) about the ancient Bohemians are reducible to this. Cosmas writes, "Connubia erant communia. Nam more pecudum singulas ad noctes novos probant hymenaeos, et surgente aurora . . . ferrea amoris rumpunt vincula." (Kovalevsky, *Modern Customs and Ancient Laws of Russia*, p. 10.) Post gives as instances of peoples among whom "marriage relations are almost unrecognizable," tribes of California and the coast of Venezuela, aborigines of Brazil and some Peruvian tribes, six instances in Oceania, three in India, and four in Africa. (*Ethn. Jurisprudenz*, i. 52.) He adds further instances, making seven in all for Africa. (*Afrik. Jurisp.*, p. 301.) Among the Wintuns of California, according to Powers, a man generally pays nothing for his wife, but merely "takes up with her." If (not being a headman) he takes a second wife, the two wives fight till one is driven out, while the husband looks on and abides in the lodge of the conqueror or follows the vanquished as he chooses. (*Tribes of California*, p. 238.) Can this relation be called marriage?

4. The looser types of marriage are almost, if not entirely, confined to savage and barbarous races. It is here if anywhere that we find promiscuity and group marriage. It is here, certainly, that we find the marital relationship so loose as to approach promiscuity and group marriage. It is here also that we find polyandry—a custom practised by no people with any pretension to civilization except the Thibetans and the ancient Spartans. Polygamy, on the other hand, while also very common among uncivilized peoples, may be said to dominate the middle civilizations, and monogamy the higher. But here we must guard against too sweeping statements. Monogamy, and a strict monogamy too, is found in several quite savage peoples, including among them some of the very lowest. The Veddahs and Andamanese have been mentioned. Elsewhere it occurs sporadically, it is impossible to see for what specific reason, among races which are generally polygamous. Thus polygamy and easy divorce are both general[1] throughout Oceania, but among the Dorians of New Guinea there is neither polygamy nor concubinage. Among the Indian hill tribes there are several instances. Some of the Naga tribes are monogamous, some polygamous. The Karens have only one wife; the Santals take a second only if necessary to obtain an heir; but in all these cases divorce is allowed. The Kukis are polygamous, but the people called the Old Kukis keep to one wife. Monogamy occurs among some of the ruder Malayan tribes. Of the Central Asian peoples the Kara Tangut nomads are mentioned by Ratzel as monogamous. Monogamy is rare among the North American Indians,[2] but it occurs in a few tribes of South America.[3] Polygamy is the general rule among the Negro and Bantu races, but instances of monogamy are found among peoples of Northern Africa as the Touaregs and the Beni Mzab.

[1] Kohler states, however, that among Papuan tribes polygamy is sometimes permitted only with the consent of the first wife. (Kohler, *Z. f. V. Rwt.*, 1900, p. 349.)

[2] Instances are the Yuroks of California, and the Karoks—among whom bigamy is not tolerated even in a chief, and, what is still rarer, a man may own as many women for slaves as he can purchase, but cohabitation with more than one brings obloquy (Powers, p. 22)—and the Klamaths (*ib.*, p. 405.) For other cases see Westermarck, p. 435.

[3] Schmidt, *Z. f. V. R.*, 1898, p. 304, enumerates five instances.

We shall understand the occurrence of such exceptions better if we bear in mind what precisely is meant both by monogamy and by polygamy when these institutions are attributed to a rude tribe. Whether monogamous or polygamous, savage tribes usually tolerate divorce on very easy terms, especially for the husband. But the division between a form of monogamy which easily admits a change of wives and sheer polygamy is no very deep one. On the other side, it is to be observed that though polygamy in one form or another is ordinarily permitted in uncivilized races, it must not be supposed to be the rule among many peoples. Generally speaking, the numbers of the sexes are approximately equal. There are exceptions to this in certain races which partly account for the abnormal development of polygamy among them, but where the relative numbers are normal it follows as a matter of arithmetic that either monogamy must be the prevalent practice, or a great number of men must go without wives. In point of fact, poverty, as well as law or custom, fights on behalf of monogamy. It is in most cases only the comparatively rich and powerful who have a large harem, and this is one reason among others why polygamy is less developed in the lowest races, and the possession of many wives comes about when wealth and population are alike growing. When we speak of polygamy being the normal custom of uncivilized races, therefore, we mean the permission of polygamy, and it is this permission that exists almost everywhere throughout the savage and barbaric world and among the lower civilizations. We should, then, distinguish between an ethical monogamy, based on the belief that it is wrong to have more than one wife, and an habitual monogamy, based on the practical difficulty of obtaining and maintaining more than one wife. Where, owing to general poverty and the equality of conditions—which would bar the making of exceptions in favour of rich men or chiefs—the practice of monogamy has become universal, and as such is of long standing, it would harden into a custom (sustained by whatever sanctions are recognized) without implying any very great advance in the ethical conception of marriage. And this may account for some of the cases mentioned, and in particular for the point often noted, that it is the ruder tribe which is monogamous, while the growth of wealth

in neighbouring peoples enables richer individuals to indulge in a harem.[1] We shall not, then, be far wrong in concluding that polygamy, limited, often very narrowly, by poverty and the relative numbers of the sexes, is the prevalent type of marriage in uncivilized society.[2] Of the development in the civilized world we shall speak more in detail later on. Polyandry, on the other hand, is by comparison an exceptional practice, the principal causes of which are most probably poverty and a deficiency in the number of women. On the evidence before us it is hardly to be described as an institution belonging to one of the great types of social organization.

5. II. *Impediments to Marriage.*

A quite distinct classification of marriage systems could be made on the basis of the prohibitions which almost everywhere restrict, in greater or less degree, the choice of a husband or wife. These prohibitions exhibit a rich variety of differences, and their meaning and origin are extremely obscure. We have already noted that they fall into two great divisions. On the one hand, there are restrictions forbidding marriage within a certain group—laws of exogamy; on the other, and quite possibly among the same people, there are rules forbidding it outside a certain group—laws of endogamy. Both kinds of restriction appear in a great variety of forms. Thus endogamy may take the form of prohibition to marry outside

[1] Travellers and ethnologists sometimes describe people as monogamous who in fact are so only by prevailing habit. The Iroquois, for instance, always figure among monogamous peoples, and no doubt that form of marriage prevailed with them and became the strict rule. Thus Morgan (*League of the Iroquois*, p. 324) states that polygamy was forbidden and never became a practice, but from Coldan's account given in Schoolcraft's work, i. 221, it appears that it existed, though rarely practised, in his time. Repeatedly we hear that the mass of the people are monogamous, but that the chiefs or the wealthier tribesmen have several wives or concubines. This was the case with the ancient Germans. Polygamy was rare in practice, but was legal.

[2] Dr. Westermarck (p. 435) enumerates in all between forty and fifty cases of savage and barbarian tribes which are monogamous. Many of these are single tribes, which are exceptions to the general rule among their kindred and compatriots. It seems to be only among the Hill Tribes of India and the Malay region, which are rich in varieties of marriage customs, that any number of monogamous tribes are found. Post (*Eth. Juris.*, i. 58, 59), after pointing out that innumerable peoples live in practical monogamy, adds, "Eine wirkliche Zwangsmonogamie ist eine verhältnissmässig seltene Erscheinung."

the clan, as in old days among the gypsies,[1] or the caste as in India, or even the family. In the ancient world foreigners could rarely intermarry unless their respective states had the *jus connubii*, and there were generally barriers on the intermarriage of slave or serf with free men or women, and a social, if not a legal, bar on the marriage of noble and commoner. In the modern world legal barriers have for the most part disappeared, and, socially speaking, equality in education alone is exacted.[2] Far more various and difficult to understand are the rules of exogamy. Marriage may be forbidden within the totem, as among many North American Indians and some Australian tribes; within the clan, as among the Nagas[3] and Somali,[4] etc.; within the village, as among the Battas[5]; or the tribe, as in Rotuma.[6] It may also be prohibited within the kindred, and here again great differences appear. All the kindred, so far as relationship is traceable, may be prohibited, as among the Andamanese and the Yoruba.[7] Or the prohibition may be applied to all the kin on that side to which the greater importance is attached, as in the Brahmanic and Chinese prohibitions.[8] Where relationships are of the "classificatory" type *e. g.* where the mother and all her sisters are addressed by the same name, while the daughters of all that group of women again have one form of address in common, the prohibition of

[1] Post, *Grundriss*, i. 33. See *ib.* for several instances in which it is the duty of relations to marry. I am not clear that it is distinctly forbidden to marry another than a relation.

[2] There are exceptions, such as the prohibition of marriage with negroes in twenty-two of the United States, with Indians in four states, with Mongolians four states. (*Parly. Papers*, *Miscell.*, No. 2, 1894, p. 155.) Otherwise the intermarrying of royal families is the principal exception. In the German code the marriage of a high noble with a commoner involves certain disabilities. (Westermarck, 373.)

[3] Godden, *J. A. I.*, xxvi. 173.

[4] Post, *A. J.*, i. 383.

[5] Waitz, v. i. 186.

[6] Gardiner, *J. A. I.*, xxvii. 478. There appear to be sporadic cases of prohibition within the same caste, or the same religious division. See Post, *Grundriss*, i. 41.

[7] Man, *J. A. I.*, xii. 126. Ellis, *Yoruba-speaking Peoples*, p. 176. The Andamanese recognize adoption and affinity as bars, but, through want of records, fail to trace kinship beyond the third generation. (Man, *J. A. I.*, xii. 127.)

[8] See Chapter ii. p. 56. If the clan is based on father-right, it will be seen that the prohibition to marry an agnate is, at least in theory, equivalent to prohibition of marriage within the clan. Identity of name, again, is taken as equivalent to common membership of a putative clan.

marriage may extend to all members of the group, and society will divide itself into classes within which a man may marry, and classes within which the women are strictly taboo to him. This class division of society runs through the Australian peoples.[1] Again, kinship may be reckoned by degrees, as among ourselves, and exogamy may be enjoined for certain degrees only, while beyond them marriage is permitted. In point of fact, under one rule or another, prohibition of marriage within the first and second degrees (parent and child, or brother and sister) is almost universal, if we take account only of the basis of relationship recognized by any given people. Thus, if the totem is exogamous, and passes by mother-right, all kindred through the mother will be excluded from marriage, but brother and sister by the same father will be no relations, and may intermarry. Indeed, if the principle is carried to its logical conclusion, the same will be true of father and daughter. On the other hand, the totemic prohibition may be eked out by a custom forbidding or discouraging the marriage of near relations as such. Thus, in New Britain we are told that though legally a man may marry his brother's daughter, since she is not of his totem, yet in point of fact such unions excite great repugnance.[2] Apart from cases in which kinship is only reckoned on one side, so that intermarriage is allowed within the half-blood, the permission of incest within the nearest degree appears very rare. Indeed, with this reservation we may say that the nearer the relationship (counting that of the son to his mother as closer than that of daughter to father), the rarer is the failure to prohibit.[3] Such failure probably occurs most often in consequence of a strongly endogamous tendency, in the form of a desire to maintain purity of blood. Hence we find cases of in-and-in breeding among

[1] Among 53 peoples examined by Tylor, who count relationship on the classificatory system, 33 are at present exogamous. (*J. A. I.*, xviii. 264.)

[2] Danks, *J. A. I.*, xviii. 283.

[3] The marriage of father and daughter, as well as that of brother and sister, is said to be allowed among the Aleuts. (Reclus, 65.) According to Post, *A. J.*, i. 382, there is no case in which incest with a mother is allowed in Africa, but among the Wanyoro, sister and even daughter marriage occur. Incest between parents and children is also found in some South American tribes. (Starcke, *The Primitive Family*, 224. Cf. Schmidt, *Z. f. V. R.*, 1898, p. 304.) Among some of the Veddahs the younger sister is the regular wife. (Sarasin, *Ergebnisse naturwissenschaftlicher Forschungen auf Ceylon*, iii. 465, quoting Bailey.)

royal families, *e. g.* in ancient Persia and Egypt, and among high castes as the Ulitaos of Micronesia.[1] But the prohibitions may be carried far beyond the first and second degrees. The Roman Church still forbids marriage to third cousins, and the attempt was made to carry it much further. Again, relationship may or may not be constituted by marriage. In many cases a son inherits his father's wives, with the exception of his own mother, along with the rest of the family property. We find the Jewish legislators, and, later, Mohammed, setting themselves against this practice. On the other side, rules of affinity may be construed as severely as those of blood relationship. On this method an immense extension of the forbidden degrees was effected by the mediæval church,[2] which was still further widened by the creation of a spiritual affinity between god-parents of the same child. The effect of this complex mass of prohibitions was such that hardly any marriage was clearly valid, while dispensations were and still are attainable allowing unions even between uncle and niece. Protestantism swept away this mass of prohibitions, and for the most part allowed marriage of first cousins, and confined the restrictions of affinity to the direct line.[3]

Of these very various rules it seems possible to say three things generally. The first is that they tend to bar marriage between people who are bound together by some other important relation. Thus the totem or the clan, which is exogamous, is also as a rule bound in a kind of brotherhood to mutual assistance. Secondly, the particular relation which is the commonest bar is that based on blood kinship. Thirdly, the violation of the rules of exogamy, whatever they are, is generally regarded with peculiar horror. It is often an object of public vengeance when no other crimes, except perhaps that of witchcraft, have been

[1] Sister marriage was common in ancient Egypt. (W. Max Müller, *Liebespoesie der alten Ægypten*, pp. 7–8, and Waitz, v. ii. 111.) For other instances see Westermarck, 290.

[2] See Huth, *Marriage of Near Kin*, 117. Huth (*op. cit.*, 120) instances the repudiation of Ingeburga of Denmark by Philip Augustus, on the ground that she belonged to a family which had previously intermarried with the family of Philip's first wife. It is fair to say that in this instance the Pope procured Ingeburga's restoration.

[3] The English prohibition of marriage with the wife s sister is the most conspicuous exception.

raised to that dignity, and in the civilized world the intensity of feeling which it excites in no way diminishes.

6. Notwithstanding the great variation in the forms which it takes, the exogamic impulse seems to perform certain functions which are fairly constant. Thus (1) it checks in-and-in breeding, both intermarriage with near kin, and often in the lower races marriage within the narrow limits of the clan or village, which in their isolation would otherwise become entirely filled with people related to one another by a network of cousinship. What precisely are the physical disadvantages of in-and-in breeding or the advantages of crossing are, however, harder to say than is popularly supposed, and it is probable that this biological side of the matter is the least important of the functions served by exogamy.[1] But (2), as indicated above (Chap. II.), it has the important sociological function of binding distinct groups together. (3) A third function of more importance in the civilized world is of a distinctively ethical character. For us the prohibition of incest is the only form of exogamy which persists, and incest is a crime which affects us with a horror, of the kind we call instinctive, and which is certainly not weaker in civilized than in barbarous humanity. What is the meaning of this horror? It is too real and deeply rooted to be explained as a survival. It is not based on tradition and convention, for it is not felt in relation to many crimes which the laws forbid. Thus, among peoples who accept the law of the Roman Church the marriage of cousins is forbidden, but frequently occurs. In our own country men may approve or condemn marriage with a deceased wife's sister, but any one who should put it on a par with incest with a blood-sister would be a very abnormally constituted person. Is the horror, then, of incest instinctive? The usual objections to this view are based on a misunderstanding of instinct. It is said that the horror is not universal, and that the objects to which it is directed differ widely in different peoples. But many instincts in the animal kingdom fail in universality and are modifiable in their application. And, as we have seen, what is instinctive or hereditary in human nature

[1] See the evidence, especially that of Mr. G. H. Darwin, collected in Huth's *Marriage of Near Kin*, chap. viii.

becomes more and more a feature of character, a tendency or disposition to feel or act which obtains its actual direction from experience, and especially from education and social tradition. Hence, to say that the horror of incest is instinctive is merely to say that there is in it something rooted in the character which the average man inherits, but it still remains to determine what that something is and to understand how it can be developed in such a variety of ways. Analysis of the feeling itself seems to justify the view of Lotze that it is the mind's protest against the blending of two distinct attitudes towards the same person. Sexual love and parental love have an element in common, or we should not use the term love of them both, but in other respects they are as incompatible as oil and vinegar. Even love and hate have something in common, an intense magnetized interest in the personality of another. But love and hate cannot fuse. The one is the enemy of the other, and so is it also with the two fundamentally opposed forms of attachment. That this is so is a truth about human relationships based on human nature, and in that sense the outcome of an instinct. But like other truths of the same kind it is not to be explained by calling it an instinct, but by analyzing its nature and explaining its function. That function has been, in earlier stages, to draw families together into society, and at all stages to keep distinct, and therefore in healthy development, the deepest affections of mankind. The earlier function being now superfluous, laws of exogamy tend to confine themselves to restraint on the marriage of that near kindred between whom strong relations and affections—incompatible with sex feeling—arise. This account enables us to understand in a general way the fluctuations in the rules of exogamy and their gradual reduction in the civilized world to the familiar prohibitions. In the first place, the feeling against the marriage of kindred will only extend to the kindred recognized. Hence, where mother-right holds we shall find inadequate provisions against marriage with the paternal kin. The relation of the child to its mother is the first strongly realized, and remains the most sacred of all human relations, and cases where the breach of that relation is tolerated are the rarest of all. We may take this relation as the starting point of the prohibitions, and then bear in mind that it is all in

accordance with the ways of primitive thought to extend them to everything indirectly or remotely associated with the tabooed relation—*e. g.* to the mother's children, her relatives, all of her totem or her name. The father may come into the account independently through the recognition of paternity or through contact with the mother, and starting from the paternal relation the taboo may be extended in the same way. The eccentricities of exogamy, then, are explained as arising (1) from an unduly extended taboo, (2) from an insufficiently felt recognition of natural relations. These are the ordinary faults of excess and defect which characterize rude morality, and are on the whole removed as civilization advances.

Thus, in earlier customs we find rules of endogamy restricting marriage by clan or caste exclusiveness, and of exogamy restricting it by rules bearing an indirect or irregular relation to the natural feeling which we are led to conceive as their starting point. In more civilized ethics we find the first set of restrictions nearly annihilated, and the latter reduced to a simple expression of the permanent feelings from which we suppose them to emanate. In both directions the more civilized ethics tends to discard rules which hamper the free exercise of choice in accordance with normal human feeling.

7. III. *The Stability of the Marriage Relation.*

Not less important than the number of parties to the union is the permanence of the marriage tie, and on this basis it would be easy to make a classification cutting right across all others. In many of the lower races, as we have already seen, the dissolution of marriage is so easy and frequent that it becomes a question whether the term marriage is at all applicable. In other cases the marriage bond is as strictly regarded as in the Roman Church. Here, again, we cannot find a continuous and unbroken development in any single direction, but once more we can with tolerable accuracy lay down that certain tendencies predominate at given stages of culture. This will be clear if once again we begin by distinguishing the different possibilities, and then briefly indicate the stage of culture at which each is or has been most frequently realized.

Divorce may (1) be perfectly free to either party; (2) it may be free to both by mutual consent; (3) it may be absolutely at the will of the husband or (4) of the wife. Next, (5) it may be free to one party or both on obtaining the consent of the family, the clan, or a court; (6) it may be open to either party on certain conditions. These conditions are infinitely various, but we ought to distinguish as cases differing in principle (*a*) those in which the only condition is of the nature of a fine, usually taking the form of forfeiture of dowry or the restoration of the bride price, and (*b*) those in which the essential condition is some fault or defect in the other party to the marriage. Further, (*c*) it may be open on the same conditions to man and wife, or (*d*) on different conditions. Very often, in fact, it is free to the husband and allowed under conditions to the wife. (7) It may be wholly forbidden, marriage being indissoluble. In this latter case a separation *a mensa et toro* is usually allowed, but sometimes this too is forbidden.

Marriage is indissoluble among the Andamans, some Papuans of New Guinea, at Watubela, at Lampong in Sumatra, among the Igorrotes and Italones of the Philippines, the Veddahs of Ceylon,[1] and in the Romish Church.

Ordinarily, however, both in the civilized and uncivilized world marriage may be dissolved either at pleasure or under certain conditions. Among uncivilized peoples divorce is not infrequently free to either party. The man dismisses his wife without ceremony, or the discontented or injured woman leaves her husband's house without more ado and runs back to her own relations,[2] or they part by mutual agreement.[3] In the higher stages of barbarism and in primitive civilization the consolidation of the family under the growing power of the husband tends to make divorce rarer and more difficult. Sometimes it drops almost entirely out of use. Thus it was a Roman boast that though divorce was not legally impossible before the case of Sp. Carvilius Ruga in B.C. 231, no instance had been

[1] I take the foregoing from Dr. Westermarck's list, p. 517. He quotes Wilken's opinion that the same held good of the Niasians and Bataks.

[2] Sometimes it is a condition that she returns the price paid for her, *e. g.* in Soulimana and frequently in Africa. (Howard, i. 226.)

[3] This Post considers to be the rule under the clan organization of society. (Post, *Grundriss*, ii. 117.)

known since the foundation of the city. Sometimes, with less justice, the power of divorce is left to the husband and withheld from the wife. It may even remain entirely at the husband's pleasure to send back the chattel which he has bought. Thus the Hebrew who found anything unseemly in his wife merely gave her a writing of divorcement and had done with her. In other cases there was at least a pecuniary deterrent. The divorcing husband forfeited the dowry, or, if the fault was his, could not regain the bride price. He had to leave his wife all the gifts he had made to her, or, finally, if she had no such property of her own, he had to pay a definite sum. Again, if there were children, provision might be made for their maintenance, or the right of divorce itself might in this case be withdrawn.[1] Similarly, where the wife has the right of divorce, she may incur pecuniary forfeits, losing her dowry, or having to repay the bride price and return the presents made at or during marriage.

Such pecuniary penalties render marriage relatively stable; but a further step is taken when it is dissoluble only under assigned conditions. These again show extraordinary variations. The husband is generally able to divorce the wife for unfaithfulness, very often for sterility, and sometimes[2] because she bears no sons; often, too, for disobedience, bodily defects, or what are considered moral failings. The wife, again, often has the right of leaving the husband in case of neglect, desertion, impotence, or cruelty—more rarely in case of unfaithfulness. As a rule, the divorced husband may marry again, but it is not always that the divorced wife has this right, especially under the system of marriage by purchase. Sometimes she is wholly prohibited from marrying; sometimes she must refrain till she has the leave of her former lord and master.

The customs of savage and uncivilized peoples as to divorce vary in such wild profusion that it is very difficult to make any general statement with regard to them. It may, however, be said that, with the few exceptions mentioned, divorce is allowed; that it is generally free to the husband on easy terms, and very

[1] *E. g.* According to Post, *A. J.*, i. 434, among the Moorish tribes of the Sahara and the Hottentots.

[2] *E. g.* in Burmah. (Post, *Grundriss*, ii. 114.)

often also to the wife, or to the two parties by mutual agreement,[1] but is sometimes restricted to special cases, and that the development of the patriarchate, and particularly of marriage by purchase,[2] tended to increase the privileges of the husband as compared with those of the wife in this relation.[3] In the

[1] In comparing the position of husband and wife, it must be borne in mind that divorce almost universally sets the husband free to marry again, while the wife, in a large number of cases, especially under marriage by purchase, is more or less narrowly restricted in this respect, so that for her, divorce rather corresponds to what we call separation. (Howard, *A History of Matrimonial Institutions*, i. 244, 245.)

[2] Howard, i. 231, notes the influence of wife-purchase in this direction.

[3] *Divorce among Savages.*—Divorce is apparently either quite free or open on very easy terms to either party among many North American Indians (Columbians, Howard, i. 238; Iroquois, Schoolcraft—Drake, i. p. 221; Upper Californians and Innuit, Kohler, *Z. f. V. R.*, 1897, p. 368.) Among the Yuroks divorce is very easily accomplished at the will of the husband. (Powers, p. 56.) In this last case the husband regains the bride price. It is free to both parties among the Eskimo of Point Barrow and of Behring Straits and Pawnees. (Howard, i. pp. 227, 228.) Among other tribes it is at the pleasure of the husband; [so stated of the North American Indian generally (Schoolcraft, i. 171); of the Oregons (*ib.*, v. 654); of the Hupa (Powers, p. 85); here the displeased husband gets back the bride price; of the Dakota (Howard, i. 232); and the Abipones (*ib.*). In the last case, however, it may lead to a feud]. Among other peoples the man must lose the bride price if he divorces without good cause. (Thlinkeets, Kohler, *l. c.*) In some the wife can leave at pleasure. The Navajo women are said by Colonel Eaton (Schoolcraft, iv. 217) to leave their husbands on the slightest pretext. Among the Digger Indians the wife leaves the husband at pleasure. (*Ib.*, 223.) Among the Cegiha the wife's relations take her away if ill-treated (Howard, 228), and the Sioux and Dakota women leave their husbands for unfaithfulness or other causes. Among the Upper Californians the deserted husband demands the return of the bride price. In the later form of marriage among the Creeks the bond holds for a year only.

Among the tribes of tropical South America the power of the husband is more developed, and he can lend, give, prostitute, sell, or exchange his wife at pleasure. (Schmidt, *l. c.*, 1898, p. 297.) In Brazil, according to Anchieta (quoted in Howard, p. 228), the wife may leave at pleasure. So among the Moxos (*Ib.*, 239). The Bonak, Guanan, and Guatamalan women have similar freedom (authorities cited by Howard, p. 239).

In Oceania divorce is generally easy, though there are one or two cases in which it appears to be unknown. In Polynesia divorce by mutual consent is lawful. (Howard, p. 230.) A Tongan husband divorces his wife by simply telling her to go. (*Ib.*, p. 231.) In Micronesia divorce is at the man's pleasure, and the same is true of the Papuan peoples, among whom the woman, if she flies, must return the bride price, while the husband, if in earnest about it, can generally reclaim her from her relatives by the terrors of witchcraft (Kohler, *Z. f. V. R.*, 1900, p. 347.) In the Torres Straits divorce appears to have been rare. Infidelity and sterility were the chief causes, but incompatibility of temper appears to have been recognized as sufficient. (*Cambridge Expedition*, p. 246.) Among the Australians the husband can dismiss his wife at pleasure. If she runs away she belongs to

Oriental civilizations, with one or two exceptions, the inequality has been pushed still further, as we shall presently see in detail.

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any one who may re-capture her. (Letourneau, pp. 13 and 18.) In Western Victoria couples may separate by mutual consent, but the husband wishing to divorce his wife must obtain the consent of the chief men of his own and his wife's tribe. She may also complain of his unfaithfulness and get him sent away for two or three moons. (Dawson, *Australian Aborigines*, quoted by Howard, pp. 229, 230.)

In Africa divorce at the will of the husband is general (Post, *A. J.*, i. 433.) The corresponding right of the wife is rarer, but not infrequent. Some 16 cases are enumerated by Post (*Afrik. Jurisp.*, p. 436), but some of them are doubtful, or depend on special conditions. Among the Fantis, Foulahs, and Kaffirs (Post. *A. J.*, p. 438), and in Kordofan and Baka (Post, *A. J.*, p. 439) the neglect or ill-treatment of the wife are good grounds of divorce. Among the Bogos her third flight is taken as final. (Post, *A. J.*, p. 437.) In many tribes the wife can be divorced for sterility (Post, *A. J.*, p. 439), and among the Kimbundas the husband can be divorced for impotence. (Post, *A. J.*, p. 441.) In many cases compensation must be given by the party which dissolves the marriage, *e. g.* among the Foulahs and the Kaffirs for groundless repudiation. In Bornu the wife retains her dowry. (Post, *A. J.*, pp. 442–3.) Among the Banyars she receives a small sum and retains all the presents she has received. (Post, *A. J.*, p. 442.) Among the Basutos, unless guilty of an offence, she is entitled to support. (Post, *A. J.*, p. 442.) In Egypt she can also claim a certain provision, and in Abyssinia she can claim her dowry as well. (Post, *A. J.*, p. 442.) Among the Bogos she takes the household utensils with her, among the Barea and Kunama she has half the joint property, and in Morocco a sum awarded by the judge. (Post, *A. J.*, pp. 442, 443.) If the woman leaves the man her family must return the bride price, and perhaps more. But the question of compensation is very naturally affected by the circumstances of the divorce. If the divorcing party has good grounds he or she pays less, or perhaps pays nothing. Thus among the Kaffirs, Foulahs, Fantis, and in Kordofan the wife does not restore the bride price if she has good grounds for leaving her husband. (Post, *A. J.*, p. 445.) Among the Beni Amer, if it is the man who divorces, the woman's property is divided, the husband taking his weapons, and the wife the house and contents. If the woman divorces the man for ill-treatment or infidelity, she gets only one-third of the common stock ; if impotence is the cause she gets half. (Post, *A. J.*, p. 446.)

Among the Yoruba (where father-right holds) the husband can divorce the wife and reclaim the bride price if she is unfaithful ; otherwise he loses the price. If he neglects the wife, she summons a palaver of her relatives, and if he persists, she may leave him. If he is of inferior rank he is liable to be flogged by her relations. (Ellis, *Yoruba Peoples*, p. 187.) Under mother-right, where the woman is not bought out of her family, the children often follow the mother in case of divorce. But this is not always the case, and sometimes the circumstances of the divorce determine the children's future. (Post, *A. J.*, p. 447.)

No obstacle is offered to the re-marriage of the man, but under marriage by purchase the husband generally retains some control over the divorced wife. Among the Hottentots and Ashantis she cannot re-marry ; among the Banguns, not in the same village ; among the Kaffirs, only if she had good grounds for leaving her husband ; among the Marea and the Habub, not till her husband declares her free. But in many cases (Post, *A. J.*

In the West the changes of law and opinion as to divorce have been numerous and sweeping, as will appear fully when we deal with marriage among civilized peoples. For the present, we content ourselves with noting the prevalence of a loose and easily dissolved marriage tie in the lower stages of culture, which gives way to a binding form of marriage with decided privileges for the husband at the next grade. We shall find this to be in line with a more general movement.

8. IV. To understand this movement, we deal first with Methods of Marriage. The principal methods by which a wife is obtained in the uncivilized world come under four heads :—

a. Capture.
b. Purchase.
c. Service.
d. Consent.

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p. 450, enumerates 8) apparently after a certain interval she is free to re-marry.

On the whole, throughout Africa, marriage by purchase prevails, and the position of the wife is accordingly less favourable.

Among the Indian Hill tribes the variations are great. The Nair wife may not only dismiss any of her twelve husbands at pleasure, but may even let him be sold into slavery for debt. (Reclus, *Primitive Folk*, p. 158.) Often divorce is free to either party. Instances are the Todas, Bodo and Dhimals (but here an adulteress must refund the bride price), and the Karens. Among the Badagas the wife may leave if she pleases, but the husband retains the children. He is also free to divorce her. (Reclus, *op. cit.*, p. 195.) Among the Nagas there is a fine according to the cause of the divorce. (Godden, *J. A. I.*, xxvi. p. 177.) Among the Santals divorce is rare, but is permitted to either party on obtaining the consent of the husband's clan. Among the Khonds the wife may leave the husband on repaying the bride price. (In some tribes this privilege is restricted to the childless.) On the other hand, she can be divorced only for adultery or prolonged misconduct, and her consent is required if the husband wishes to take a concubine (Reclus, p. 280) ; and, a rare note in the savage world, infidelity on the part of the man is held dishonourable.

Among the peoples of Central Asia divorce appears to be open to the man at pleasure and to the woman for persistent ill-treatment. (Ratzel, vol. iii. p. 342 ; Letourneau, *La Femme*, p. 210.)

Among the Malays, divorce is greatly influenced by the form of marriage. In the Ambil Anak marriage the wife may divorce the husband. In the Djudjur marriage all the advantage is on his side, but she can generally escape from him if ill-treated. In the Semando form of marriage (see Waitz, v. p. 145) the taking of a second wife or concubine is a ground of divorce, and in one place (Mokomoko) this is the only form recognized. (Waitz, v. 145, etc.) Among the Battaks of East Sumatra there is no one-sided divorce, except for attempt to murder, and mutual agreement is required. (Howard, p. 229.)

A few words may be said here of the general character of these four methods, while their bearing upon the marriage relation will be further discussed in the following Section.

a. Marriage by *capture* is a somewhat ambiguous term. The practice of taking women captives in war or in petty raids is widely diffused over the savage world. In the genuine and unadulterated form of carrying off a bride from a strange tribe against her will and that of her relations, it occurs, according to Professor Tylor, in some forty cases.[1] From this genuine capture Professor Tylor distinguishes connubial and formal capture. Connubial capture is not a mere form, but is a recognized method of obtaining a bride between families living at peace with one another, and is not regarded as a sufficient ground of quarrel. Of this Professor Tylor finds forty-six cases. Finally, he enumerates forty-four cases in which the form of capture is retained without the reality as part of the wedding ceremony. One illustration will suffice :—"Among the Bedouins of Sinai the bridegroom seizes the woman whom he has legally purchased, drags her into his father's tent, lifts her, violently struggling, upon his camel, holds her fast while he bears her away, and finally pulls her forcibly into his house, though her powerful resistance may be the occasion of serious wounds."[2] In other cases the resistance is less determined, and the form of capture is reduced to a mere symbolical act. The wide prevalence of these forms led McLennan and others to the belief that capture was originally universal; but this opinion is now abandoned. Capture, as we shall see further, is incompatible in principle with the widely-diffused primitive system of mother-right, and its existence as a form may be explained in many instances by the necessity of a symbolic act to express appropriation. The symbol, in fact, is not necessarily a survival of something more real, but may be rather a legal expression of the character of the act performed.

[1] As an incident of savage warfare it is probably more frequent. A long list of instances of the practice is given in Howard, vol. i. p. 158. From Cape Horn to Hudson's Bay women are regarded as legitimate booty. The practice of capture prevails throughout Melanesia, has existed throughout Tasmania, New Zealand, Samoa, New Guinea, among the Fiji Islanders, the Indian Archipelago, and to a limited extent in Australia ; it is found occasionally in Africa, and in various ancient nations.

[2] Howard, i. 165, 166.

b. Purchase. A far commoner method of obtaining a wife is that of purchase. Where this method is fully developed the unmarried girl is not her own mistress. She is one of the family; more, she is the property of the family or of the family's representative—the governing male, her father, brother, guardian, whoever he may be. She is an asset of a certain value to the family, the amount depending partly on her attractiveness, partly on her labour, partly on the scarcity of the article. This article can be sold for so much, and the purchaser naturally becomes wholly possessed of what he buys.

We shall see, accordingly, that this form of marriage is intimately associated with the extension of marital power, but the extent of this power and the subjection alike of the unmarried woman and the wife vary very greatly in different cases. The nature of the purchase also varies. Very frequently there is a return gift from the bride's parents, and in some cases the return gifts equal, or even surpass, the price originally paid.[1] It is generally assumed that this exchange is a modification of purchase, and that it is through the increase of the return gift that the opposite practice of the dowry arises. It is also possible that the exchange of presents arises independently in connection with marriage by free consent of the parties as a method of cementing the union of the two families. However, when gifts of serious value are exchanged, we must admit that the whole proceeding bears the character of a commercial transaction in which the girl, so to say, is an item on one side of the account.[2]

c. Service. Where the husband is not able to pay for the wife he sometimes receives her on credit, and in default of the

[1] *E.g.* in Columbia (Howard, vol. i. 192). In the Torres Straits, apparently the gifts are ultimately balanced by return presents, yet the transaction seems to retain a commercial character. The chief Maino told Dr. Haddon that he paid for his wife a camphor-wood chest with 7 bolts of calico, one dozen shirts, one dozen singlets, one dozen trousers, one dozen handkerchiefs, two dozen tomahawks, one dozen hooks, two fish-lines, one long fish spear, one pound of tobacco, two pearl shells, and "by golly, he too dear!" (*Cambridge Expedition*, p. 231.)

[2] Very often the girl purchased is balanced by another girl upon the other side of the account; in other words, A, wishing to marry B's daughter, gives B's son his own sister in exchange. (For instances, see Howard i. 185; Westermarck, 390.) We might, indeed, make a separate type of this practice and call it marriage by exchange.

possibility of payment may work out his debt in the form of service. This practice is familiar to us from the case of Jacob, and is found to this day in many parts of the world.[1] In this case the husband enters the wife's family for the period of his service, which being concluded he returns to his own people and sets up a house on his own account. But while residing with his wife's relations the husband is rather a tolerated visitor than the lord and master of his own family. Indeed, he is but partially tolerated, for this residence in the wife's home is frequently associated with the taboo separating the husband from the wife's relations. They are bound to mutual avoidance because, as being generally members of separate totems or clans, they are in theory enemies. On the other hand, when the service is completed and Jacob has led Leah and Rachel to his own home, his authority is vindicated and he has whatever rights the custom of the tribe allows. The sustaining cause of this form of marriage appears to be principally economic. The man serves because he has not the property to buy a wife, and so we find marriage by service existing side by side with marriage by purchase.

d. Consent. In all grades of culture the human factor has its say in the arrangement of marriage, and probably in the lowest grades of all the agreement of the parties is often sufficient to determine a union. Even where capture or purchase is developed, this factor cannot be wholly eliminated. A pair who are determined on having each other will settle all questions of right, in the savage as in the civilized world, by elopement. The actual influence of the woman's wishes is, of course, often a question of fact rather than of right. If, confining ourselves to the latter point, we put together the numerous cases of child betrothal, the instances in which women are acquired by purchase or exchange, or by hostile capture, and finally, cases in which, though the consent of the woman is asked, that of her

[1] In Africa, among the Quoja, Fantis, Banyai, Edeyahs, and in Futatoro, also among the Zulus and Basuto. It is found in N. America among the Aleuts and other Indian tribes; in S. America among the Brazilians; and in the backward tribes of Asia among the Nagas of Assam, the Kookis, and among other hill tribes, also among the Tunguses, the Ainu, the Kamchadeles, and the aborigines of China; among the Dyaks and some of the Philippinos, and here and there in Oceania. (Westermarck, *Human Marriage*, 390; and Post, *A. J.*, i. 378.)

guardian is also necessary, we shall arrive at the conclusion that the explicit recognition of a woman's free power to dispose of herself is upon the whole the exception in the uncivilized world.[1] In practice her liberty is greatest where the family organization is lowest, and the authority of the father least developed.

[1] Westermarck (p. 215) makes a fairly long list of cases in which the bride's consent is of greater or less importance. But from the nature of the case it is difficult to classify the customs of different peoples on this head. It does not need arguing that a woman may find means of making her own views felt whatever the customs of the tribe. Of the Fuegians, who are referred to by Dr. Westermarck, Messrs. Hyades and Deniker say distinctly that the parents give the girl in marriage without asking her consent. We can accept this statement and still believe that if she is resolute enough to leave her husband and persist in her aversion she will get her parents to give her to some one whom she likes. (Westermarck, *l. c.*) Among the Hottentots and Kaffirs distinct compulsion is exercised according to Post, *Afrik. Jurisp.*, i. p. 363. But, no doubt, the woman's choice also has influence among these peoples. Often the most opposite customs occur in the same tribe, *e. g.* capture, purchase and choice by the woman among the Digger Indians (Schoolcraft, iv. p. 223), and this is merely what the facts of human nature would lead us to anticipate. Elopement and a peculiar form of child betrothal co-exist among the Central Australians, and by way of exception they also have marriage by capture. (Spencer and Gillen, p. 104.) In the Marquesas Islands Letourneau remarks that the parents' objections are often overcome by the pair decamping together. (*La Femme*, p. 106.) This is a remedy known to the civilized world as well, but it proves nothing as to law or custom. Matters are more strictly defined among the Oregon Indians, where marriage is by purchase, or if, as will happen, a runaway match occurs, the woman is looked down on as a prostitute. (Schoolcraft, v. p. 655.)

In many cases child betrothal co-exists with the right of choice by the grown up woman. Thus, among the Yoruba, according to Captain A. B. Ellis (*The Yoruba-speaking Peoples*, pp. 183-185), there is child betrothal, but a woman cannot be forced into marriage though she may be prevented from it. Among the Ainu, Batchelor (p. 141) notes child betrothal as an occasional practice now extinct, marriage going now in the main by the consent of the parties.

Post (*Afrik. Jurisp.*, i. pp. 364 and 371), who notes eight cases in Africa where the bride's consent is required, remarks that practically the consent of the guardians is also necessary, but information is scanty. The Yoruba, quoted above, would be a case in point.

The means of securing consent are often sufficiently savage. *E. g.* according to Post (*l.c.*, p. 363) the reluctant Hottentot maiden must pass a night with the lover and become his wife if he succeeds in ravishing her. Among the Mandingos the girl has the option of remaining unmarried, and if ever given to another, her first lover may make her his slave.

A variant to the ordinary case of the disposal of a girl by her parents occurs when a man acquires a right to a woman by his position. This appears under the Levirate and also in cases like that of the Oregon Indians, where marrying an eldest daughter entitles a man to all her sisters, even if one of them be already the wife of another (Schoolcraft, v. p. 654.)

9. V. *The Relation of Husband and Wife.*

To understand the ethical import of this bewildering variety of customs we must look to the conception of the family and of the relations of its members to one another. The specific explanation of the rise of particular forms at particular times and places may be unattainable, but by taking the conception of the family as our starting point we shall, I think, be able to understand how it is that abnormal forms like polyandry and partial promiscuity are possible in primitive society, why they disappear at a later stage, why polygamy existing in the lowest culture is extended and reaches an abnormal development in the middle civilization, and why in the West it has given place to monogamy. Here, if anywhere, again we may hope to gain some insight into the causes affecting the permanence of marriage, and to trace out the devious and tangled laws by which this varies in different stages of culture, to understand finally the conditions under which the methods of marriage just enumerated arise in early society, and how the first three forms gradually yield to marriage by consent. In tracing this evolution we have to deal not with any single cause or with any single and continuous development, but with a blending of ethical conceptions, themselves various, confused and even conflicting, with religious principles, and economic and social forces.

The result which emerges from all this confusion may, however, as I think, be briefly stated, and it will conduce to clearness if it is set out beforehand. Broadly, the family may be said to have gone through three stages of development. In its first form the natural family, by which I mean husband, wife and children, is not yet complete; husband and wife are not as yet united in the sense in which they become legally and morally one flesh in the higher forms of marriage. This form of marriage, of course, corresponds to the maternal clan system. In the second form of marriage the natural family is complete, and the husband is the head; but it is completed at the cost of the greater subjection of the wife, who, in passing into the husband's family, merges her personality in his, often almost like a slave. In the third form of marriage the union of the family is maintained by the closest moral bond, but the full legal and moral personality of the wife, as well as of the husband, is preserved.

This third form of marriage must be regarded as a type or as an ideal rather than as an actuality.[1] To achieve it is a problem which civilization has yet to solve, since the solution involves a certain reconciliation of contradictories; and if we wish to recognize any types of marriage as belonging to this class we must exercise a little liberality and admit all such as make a *bona fide* effort towards the solution. These efforts belong, in the main, to the story of civilized marriage. We have first to consider the two lower forms, which together dominate the uncivilized world. In the early stages of historical investigation into the beginnings of civilization it was thought that society arose out of the patriarchal family, and that in Abraham, Isaac and Jacob, or again in the Roman *paterfamilias*, as we reconstruct him from the laws of the Twelve Tables and what we know of earlier Roman law, we have a type of primitive human government. The researches of Bachofen, McLennan, Morgan, and others opened up an entirely new field of speculation. It was shown that the lower we go in the scale of civilization the more prevalent we find a type of organization which is in many ways the opposite of patriarchal, putting the mother for many purposes into the father's position. Amongst civilized nations which have passed out of this stage we find indubitable traces of their having gone through it at an earlier period. These observations led to the setting up a matriarchal, as opposed to the patriarchal, theory, and to the belief that in the dim red dawn of man there was a golden age of woman, which later on passed into the iron age of male despotism. The facts were sound, but the inference drawn from them was precarious, for it was not sufficiently recognized that there was a distinction between *matriarchy*, the rule of the mother, and what I have spoken of already as *mother-right*, rule going through the mother and dependent on the mother. What is really common among the lower savages, and may even have been universal at a certain stage, is not matriarchy, but mother-

[1] I do not add the religious conception of marriage (as a sacrament) as a fourth type, because the religious (or magical) conception is present at each stage as a basis or framework for law or custom rather than as an independent form of the marriage relation. At the same time these religious conceptions, particularly under Christianity, have deeply affected the actual contents of the law, and in relation to the permanence of the union may be said to have constituted a special type.

right, and along with mother-right, and where it most flourishes, it is perfectly possible for the position of women to be as low as the greatest misogynist could desire. The actual number of cases in which the woman has a controlling or even an equal position are very few. I will mention one or two of them later on. As a general rule, where the father is not head of the household that place is taken by the wife's brother, and the maternally organized clan consists of units composed each of a woman, her brothers, and her children. The woman is not necessarily any better off because she is ruled by a brother in place of a husband.

Let us set the two types of family in contrast. Under mother-right the wife, under father-right the husband, is the pivot on which the family relationships turn. Under mother-right the wife remains a member of her own family. Under father-right she passes out of her family altogether, she is even separated from the family cult and family gods, her husband's people are her people and his gods her gods. Under mother-right the children take the mother's name and belong to her kindred. In cases of divorce they follow the mother. It is the mother's family who protects them. Her brother is their natural guardian, and exercises all the rights and duties which may belong to that position. The maternal kinsfolk stand together in the blood feud, they and not the husband protect or avenge the wife and her children. They may even protect her and them from the husband himself. In extreme cases the children are not held to be related to their father or to their father's family at all, whence in some peoples, half-brother and half-sister may intermarry as in the well-known case of Abraham and Sarah.[1] Under father-right, on the contrary, it is relationship through the male which counts. The father is the natural guardian and protector of the children and in case of divorce retains them. It is to him and his kin that wife and children

[1] Similarly among the Spartans children of the same mother might marry, but not those of the same father. The Samoyedes had a similar rule. (Post, ii. p. 60.) But these logical consequences are by no means always pressed. The actual facts of kinship have their weight. Thus, to take a single instance, in New Britain a man may legally marry his brother's daughter, but in practice is restrained by the general feeling of repugnance to such unions. (Danks, *J. A. I.*, xviii. p. 283.)

look for protection. In extreme cases it is only such relationship that is regarded. The wife and her children cease to have claims on her family, while relationship to the male ancestors and descendants is traced to the remotest degrees. These consequences of the strict principle of father-right, however, are seldom pushed to the full length. Relationship through the mother is generally a bar to marriage, though the degrees are not carried so far as upon the masculine side;[1] nor is the wife often so cut off from her relations as the strict consequences of the paternal theory might lead us to expect. Her family as a rule retains a right of protecting her if she is ill-treated; she will fly to them for succour, and their right to guard her is recognized.[2] Lastly, under mother-right the property passes through the woman, if not to the woman. Under father-right it goes from father to son.

10. How father-right arose in history we do not know, we cannot even say with certainty that the alternative form of mother-right in all cases preceded it. We do know, however, that mother-right extends over a great part of the savage world of to-day, in some cases in a pure and typical form, in other cases blended with foreign institutions belonging in logic to the opposite principle. Pure or mixed, it prevails over a great part of the Indian population of North and South America, among the Oceanic peoples, and among many Negro peoples. It is so common as almost to deserve the name of the dominant form of family life among many of the lowest races of the world. This is not all. Among almost all races are to be found traces of the same institution, so that, if not

[1] Thus a Hindu must not marry within the seventh degree on the father's, or the fifth on the mother's side. (Mayne, *Hindu Law*, p. 87, 4th ed.) Manu makes a deeper distinction: "a damsel who is neither a Sapinda on the mother's side nor belongs to the same family on the father's side is recommended to twice-born men." (Manu, iii. 5.) Sapindas are relations whose common ancestor, if a male is not more than six, if a female not more than four degrees, removed from either of them. Manu thus insists on complete exogamy to the male line, while forbidding the female kin only to certain degrees.

In Roman law the praetors early began to recognize the full right of blood (cognatio) as against the strict agnatio of the patriarchate. (Maine, *Ancient Law*, p. 151.)

[2] Cf. Vinogradoff, *Growth of the Manor*, pp. 11, 12 (the Celts); 136 (the Germans).

certain, it is still probable, that mother-right was once universal, and represents the primitive form of the family. On the other hand, father-right is the prevailing system in all Indo-Germanic peoples, among the Semites and Mongolians. It appears in some cases among the Red Indians, and more often among the South American tribes. In Oceania it is rare; throughout Africa it is intermingled with the opposite system.

If we do not know how or when it arose, we can with some certainty specify certain conditions under which it arises. The first of these is the recognition of paternity, the second is the rise of certain forms of marriage involving the appropriation of a woman by her husband.[1] As to the first point, paradoxical and almost incredible as it may appear to us, there are cases in which primitive men find a difficulty in understanding that a man is responsible for the birth of a child, and attribute it to the action of a spirit or an inanimate object.[2] It is clear that the recognition or non-recognition of fatherhood must make all the difference to the position of the husband in the family, and in fact we find the transition to father-right frequently associated with the curious custom of the couvade, which, however it is to be understood, is clearly a recognition of the relation of the father to the new-born son. The essence of the couvade is that the father has to take certain precautions at the time of birth. Whatever the precise meaning of these precautions—whether they are to protect the father, a portion of whose soul is passing into the child, or the child in whom the soul is finding a new lodgment—they represent a recognition of paternity, and apparently recognition in a crude and early form in which it is conceived as a passage of the father's soul into the child's body. Hence it is very natural that the custom should flourish at the stage at which father-right begins to assert itself, and this is what we find. Among the Melanesians, for

[1] Both of these I take to be essential to the full development of the paternal system, but either by itself may engender some of the consequences of father-right. *E. g.* in some Central Australian tribes the son follows the father's totem, though paternity is not understood. It suffices that the husband is master of the mother. (Spencer and Gillen, ii. 145, 175.)

[2] This is the theory of the Central Australians. (Spencer and Gillen, i. 265 and ii. 330.) Some Melanesians hold that paternity is due to a cocoa-nut, bread-fruit, or something similar. (Codrington, *J. A. I.*, xviii. 310.)

example, there are islands where mother-right prevails, but the husband has begun to assert himself, taking the wife to his father's house or to his own, if he has one ready, where he remains undoubted master. Here there is a mild couvade, the father refraining from exertion, and from certain foods. But in the South-Eastern Solomon group, where father-right is more developed, the couvade is also more conspicuous.[1] So again in quite another part of the world, among the South Americans, we find it just at the turning point where mother-right passes into father-right. Where the position of the father has long been recognized and is thoroughly established, the custom disappears. Its flourishing time is at the period when the one system is beginning to give way to the other.[2]

If the first condition of the paternal system is the recognition of the man's relation to his children, the second condition is that he should appropriate the wife as his own. This he clearly does not do as long as she remains in her own family, retaining her property as a member of that family and having her children in turn reckoned as members of it. But there are two processes known to primitive man by which a man can make a woman his own property and transfer her to his own family, viz. the methods of marriage described as capture or purchase. Professor Tylor justly points out that the practice of capture must tend to break up the whole system of mother-right. When the woman is carried off from her own clan to her husband's house the physical facts conflict with any custom or law regarding her and her children as still belonging to her family rather than to his. Hence out of forty cases of genuine or "hostile" capture Prof. Tylor finds that six only occur in the maternal stage. Of "connubial" capture he places twenty-one instances in the stage of transition from the maternal to the paternal system, and twenty-five in the paternal system proper. There are no instances under pure mother-right. Finally he enumerates forty-four cases in which the form of capture is

[1] Codrington, *J. A. I.*, xviii. 309–11. Cf. Kohler, *Z. f. V. R.*, 1900, p. 355, on the couvade in Papuan custom.

[2] Schmidt, *Z. f. V. R.*, 1898, 297. "Sie (*i. e.* the customs connected with the couvade) werden sich also am ausgeprägtesten gerade während jene Uebergangszeit zeigen wo das eine Princip (*i.e.* Vater-recht) das Andere abzulösen beginnt."

retained without the reality as part of the wedding ceremony Of these he finds no instances under mother-right, but twenty-one in the transitional stage and twenty-three under the paternal system.[1]

Now though, as we have seen, there is no reason to think that capture was ever universal or that it was the original form of marriage, it is beyond doubt one very primitive way of compassing that type of marriage which involves ownership of the woman, and it is quite intelligible that in a tribe where mother-right prevailed those men who by their own bow and spear could obtain women from a neighbouring clan should treat those women as their own property, and so establish a working model of the patriarchate. It is also readily credible that the new type should be more popular than the old—at any rate among the men—and that they should seek to extend it to cases in which the wife belonged to their own clan, and so establish universal father-right. But to lay down that this was the actual process by which father-right came to prevail would be to go far beyond our evidence. There is no proof that all patriarchal societies have gone through the stage of marriage by capture, and its frequent appearance as a form is not conclusive. The explanation may be that some form was necessary to assert definite ownership, and that the natural form of asserting definite ownership was the form of capture.

The alternative and in reality commoner method of appropriating a wife is that of purchase, and the fact of purchase is closely associated with the whole position of women in cases where the patriarchate is strongly developed. We are moving here in a region permeated with ideas of slavery, the ownership of one human being by another, permeated also by the idea of a family as a unit to which each member belongs as a limb. The bride purchased from her own family passes out of it and into that of her husband.[2] Where the consequences are pressed to their furthest extent her family lose the power of protecting her, and, since in

[1] Tylor, *J. A. I.*, xviii. 259.

[2] It must not be assumed that marriage by purchase always implies father-right. Under mother-right a man may pay a bride price for the usufruct of a woman (*e.g.* among the Papuas, Kohler, *Z. f. V. R.*, 1900, pp. 347, 348). But it is easy to see that out and out purchase goes naturally with, and may be said logically to necessitate a thorough-going paternal system (see below, pp. 168, 169).

barbaric society there is no law except the protection of one's family, the wife is at the mercy of her husband as to life and limb. He may dispose of her at pleasure, he may sell her, give her away, or lend her; and she has no right of redress against him.[1] At best she may escape from him if her family return her price and buy her back. Also, there is nothing in this order of ideas to prevent the husband buying as many women as he wishes. This extreme form must not be taken as the normal case. Natural feeling after all has its way everywhere in the world, affection and the sense of kinship survive the technical exclusion from the family, and so we more often find that by a kind of compromise the wife's relations retain certain powers of protecting her. Her murder would in many cases excite the blood feud, and if she runs away from her husband, and can satisfy her relations that she had good cause in his ill-treatment, they will in many instances stand by her and give her protection.[2] Still, her position, even in such cases, is rather that of a

[1] Post (i. p. 171) instances former customs among Parthians and Armenians, the Gypsies, Tscherkessen, Maravis of South Africa, and ancient Germans, and quotes Cæsar on the Gauls: "Viri in uxores sicuti in liberos vitae necisque habent potestatem." Among South American Indians the father can lend, sell, or exchange the wife. (Schmidt, *l. c.*, p. 298.) The right of the husband to kill the wife taken in adultery is general—Post, i. p. 172, says "gänzlich universell."

[2] See above, p. 162. Among the Somali and in the Gaboon the husband who kills his wife must pay a fine to her family. (Post, *Afrik. Jurisp.*, p. 62.) This, I suppose, is a composition for blood vengeance. So too among the Kaffirs. (*Ib.*, p. 401.) Among the Ainu, Batchelor (*The Ainu of Japan*, p. 138) notes a change. Formerly the head of a family had absolute powers to divorce, disinherit or punish. Now little can be done without consulting neighbours. Among the Australians, the clan will protect the wife from excessive cruelty. (Letourneau, *La Femme*, p. 13; Post, *l. c.*, p. 173.) Among the Mandingos the wife is protected by the judge. (Post, *Afrik. Jurisp.*, p. 402.) Among the Yoruba by her family. (Ellis, *op. cit.*, 187.) Among the Malays in the "djudjur" marriage the wife passes by purchase into the husband's family, yet the wife's parents can interfere to protect her in case of cruel treatment. (Waitz, v. p. 144.) According to Dr. Westermarck (*Position of Women in Early Civilization, Sociological Papers*, p. 155), "there are peoples among whom the husband's authority is almost nil, although he has had to pay for his wife." But no instances are given, and I imagine them to be rare. An interesting trace of the feeling that it is the duty of a wife's relations to avenge her, is found in the *Alcestis*, vv. 731–3, where Admetus' father threatens him with the vengeance of Alcestis' brother, though Alcestis has chosen voluntarily to die on Admetus' behalf.

δίκας τε δώσεις σοῖσι κηδεσταῖς ἔτι.
ἦ τ' ἄρ' Ἄκαστος οὐκέτ' ἐστ' ἐν ἀνδράσιν,
εἰ μή σ' ἀδελφῆς αἷμα τιμωρήσεται.

protected dependent than of a free woman. Slavery is still slavery though the position of the slave may be mitigated by law, and such mitigation is in reality no rare occurrence even for the actual slave at the level of civilization which we are considering.[1]

The appropriation of the wife consolidates the "natural" family, but at the cost of a more or less complete subordination of the wife. Hence the position of the woman seems, if anything, to change for the worse as society takes its first step in advance. This deterioration, however, is perhaps less severe than appears at first sight.

11. *The Position of Woman in Early Society.*

Favourable as the position of woman under mother-right appears on the surface, the truth is that it is no bar whatever to complete legal subjection. Among the Caribs, where descent goes through the female only, the women were nevertheless in an inferior position. The husband alone had the right of divorce and he could exercise it at will, the only effect of mother-right being that in case of divorce the wife would retain the children. Among the North American Indians generally, notwithstanding the tendency to mother-right, the position of women is on the whole admitted to be low.[2] In Melanesia, where there is strict mother-right, the mother is in no way head of the family. The family house is the father's, the garden is his, the rule and government are his.[3] In Oceania generally,

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Naturally, however, the right of protection by her relations is more effective when the wife is still regarded as a member of their family. (Post, i. p. 173.)

[1] For instances see Post, i. 171–177.

[2] See Waitz, iii. 101, 382; Catlin, *N. A. Indians*, i. 23 and 226. Ratzel puts it that the position of the women is not in all cases one of oppression (ii. 128).

[3] Codrington, *J. A. I.*, xviii. 309. Dr. Westermarck, who on the whole takes a favourable view of the position of women among savages, declines to attribute any influence in this direction to mother-right. (*Sociological Papers*, p. 157; *Moral Ideas*, 655–7.) Herein he is opposed to Steinmetz, and to Ratzel. (See *e. g.* Ratzel, *The History of Mankind*, ii. 334.) The argument that (*e. g.* among the Australians) the position of women is not sensibly affected by the system of descent, is not very forcible, since the importance of the family is so small as compared with that of the local group and its divisions, that the mode of reckoning descent naturally counts for little.

where mother-right is common, the two sexes are in large measure separated in their lives through the complex mass of taboos which prohibit their intercourse.[1] The head of the maternal family may have the same despotic power as the patriarch—thus among the Barea and Kunama he has the power of life and death; among the Bangala, the Kimbunda, and on the Loango coast the right of selling any member of the family; and in general under the maternal as under the paternal system the head is a male.[2]

Apart from the general tendency to overlook the masculine headship of the maternal family, and so confuse mother-right and matriarchy, mistaken views have arisen from the identification of marriage by service with the subordination of the husband to the wife. The man who cannot buy a wife becomes a servant to her family, but not to her. Jacob did not serve Rachel, but Laban, and when the term of service was complete both Leah and Rachel remark that they have now passed out of their father's family. They identify themselves with Jacob, and Rachel steals Laban's household gods on his behalf. At the same time marriage by service does fairly illustrate some of the conditions which modify the relation of husband and wife, and may even affect the question whether mother- or father-right is to prevail. The man serves because he has not the property wherewith to buy him a wife, and so we not infrequently find that the two kinds of marriage subsist side by side. Thus among some Californian tribes purchase is the rule, but if a man can only pay half the bride price he enters the wife's house in a servile position.[3] Similarly among the Micronesians of Mariana the husband must serve if he has not wealth enough to support the wife. The best instance may be drawn from the Malay Archipelago, where the two opposed types of marriage are found fully developed with special names. In one, *Ambil anak,* the husband is purchased by the wife's family; he enters it as a rule in a dependent position, the children all belong to the mother's

[1] In some instances, however, the position of women is, or has been, favourable in Oceania, *e. g.* in Micronesia, and in New Zealand. (Ratzel, i. 273–274, and Waitz, iii. 101.)

[2] Post, *Grundriss,* i. 134–6. Post notes that there are exceptions.

[3] Kohler, *Z. f. V. R.,* 1897, p. 383.

family, and the wife has the right of divorce. In the other form, *Djudjur*, the husband or the husband's family has to purchase the wife; she becomes his property, the children are his, and he has the right of divorce. Her parents only retain a certain right of intervention in case of cruel treatment.[1] In such cases at least it is clear that the relations of husband and wife are determined not by any prevalent custom or opinion prescribing what such relations ought to be, but by the actual success or failure of the man in finding means whereby to appropriate a woman to himself.[2] Thus the difference between the maternal and paternal systems do not turn on divergencies of principle as to the rights of women, nor does the superior position of the wife's family necessarily imply any similar superiority in the wife herself. No doubt under mother-right the woman derives some advantages from her position, such as the retention of her children in case of divorce, but the cases in which it has given her real equality or superiority prove on examination to be very rare. Among the Nairs, who are sometimes quoted in this connection, and who, as has been mentioned, combine polygamy and polyandry, the woman chooses her husband and brings him to her home. Possessions pass from mother to daughter. The woman may divorce her husband, or rather any of her husbands,

[1] Waitz, v. i. 144 ff. Cf. Marsden, *History of Sumatra*, p. 220, etc., cited in Spencer's *Descriptive Sociology*.

[2] We may note in this connection that among civilized peoples which have completely developed the patriarchal system, and perhaps even passed beyond its extreme phases, there is a tendency to the subjugation of the husband, in cases where women are allowed control of their own property, if the wife is the wealthy one. I am not speaking from the point of view of the humorist or the novelist, but of the lawyer. Thus, few peoples have pushed the right of the father to a more extreme point than the Japanese in the Far East, or the ancient Romans in the West. Yet among the Romans, when women acquired by the *Lex Julia* complete control over their dowry, the result was that the husband frequently passed into practical subjugation to a rich wife. In Japan it is astonishing to find the recrudescence of the primitive custom of the husband coming to live with the wife, and taking her name in the case where the eldest daughter inherits an estate, or where the bride's father supplies the house. From instances like these, drawn from cases where the patriarchate had its most extreme development, we can understand the full strength of the economic factor in determining marital relations, and we may draw the inference that where in the uncivilized world we find the husband passing into the wife's family, even in an inferior position, it does not follow that any favourable inference is to be drawn as to the prevalence of an ethical conception of women's rights.

at pleasure. Among some of the tribes, *e. g.* the *Pani Kotche*, the husband goes to live with his mother-in-law, who is head of the house, and may incur no expense without her authority or else he is personally responsible. It sometimes happens that for this reason he is sold as a slave.[1] Often a brother and sister set up house together, the tie between them being held closer than that between husband and wife, and if in such a case the wife goes to live with a husband she will be subject to the sister. It follows also that the child is attached to the uncle rather than the father. In such an organization the family, as we understand it, is of course completely broken up, and there is no doubt that the position of the woman makes her in a way the centre of the whole organization. There is equally no doubt that in this case she acquires from this position a considerable authority. But we are also told that, although she inherits the property, her brother or maternal uncle administers it, and, again, it is administered rather on behalf of the whole group of kinsfolk—that is to say, as collective property—than as belonging to any individual owner, so that after all we are not very far removed from the normal state of things under mother-right, where the woman is subject to her brothers instead of to her husband.

Somewhat similar cases may be cited from among the North American Indians. Here the women had occasionally a certain measure of political importance; for example, they might be represented by a spokesman, either male or female, at the men's council, and they sometimes originated warlike expeditions with the object of replacing, by a raid and the capture of a prisoner, the loss of a warrior of the clan. To them, also, as we shall see later on, was referred in many cases the fate of the prisoners taken. They decided whether prisoners should be tortured or adopted, and, moreover, took a special part, with a peculiar zest, in the execution of the tortures when a decision was taken in that direction.

Among the Iroquois, where we have some of the most detailed accounts, we are told that the women occupied a dominant position in the Long House where the joint family lived. "Usually the female portion ruled the house, and were doubt-

[1] See Reclus, *Primitive Folk*, pp. 156–8.

less clannish enough about it. Stores were in common, and woe to the luckless husband or lover who was too shiftless to do his share of the providing. No matter how many children or whatever goods he might have in the house, he might at any time be ordered to take up his blanket and budge. . . . The house would be too hot for him, and unless saved by the intercession of some aunt or grandmother, he must retreat to his own clan, or, as was often done, go and start a matrimonial alliance in some other."[1] The women, says Morgan, were the great power in the clans. They could "knock off the horns" of a chief, and of certain chiefs they had the nomination. Yet even among the Iroquois we do not find that the position of women was altogether good. On the contrary, they did all the drudgery of house and field. They were socially separate from the man, and the conquered Delaware were named women as a term of reproach, and compelled to forego arms as a mark of contempt.[2] Of the North American Indians generally, Waitz[3] makes a remark which goes to the root of the matter, that though property passed by the women they seem to have had little or none of their own. There remain a few scattered cases in which the wife—not merely the wife's family—is said to enjoy superiority or even authority. Among the Koochs of Bengal it is stated by Dalton that the husband goes to live in the wife's clan, and that his property passes to her daughters only, and not only this, but he has to obey his wife, and what is, perhaps, more extreme, her mother as well.[4] According to Herrera, men in Nicaragua in his day become slaves to their wives,[5] and among the tribes of Esquimaux at Nootka Sound and at Cross Sound, women are somewhat vaguely said to have a superior position to men.[6] Other cases[7] in which a higher position is attributed to the wife either depend on her superior social or economic position, or on the failure of the husband to

[1] From a letter by the Rev. A. Wright, a missionary among the Senecas, written in 1873, and given in Morgan's *Houses and Houselife of the American Aborigines*, p. 65. It is worth noting that Mr. Wright appears to be describing a past state rather than that which he actually saw.

[2] Schoolcraft—Drake, i. 277, 388. Morgan, *League of the Iroquois*, 323.

[3] Waitz, iii. 129.

[4] Letourneau, *La Femme*, p. 384.

[5] *Ib.*, 175.

[6] Waitz, iii. 327–333.

[7] The well-known statement of Diodorus as to the supremacy of Egyptian wives will be dealt with below, chap. v.

pay her price.[1] They do not indicate that the position of the woman is as such equal or superior to that of the man.[2]

A handful of exceptions such as these, however interesting as disproving sweeping generalizations, do not alter the fact that in the great majority of uncivilized peoples the position of women is in greater or less degree inferior to that of man in point of personal rights.[3] Apart from a sufficiently frequent

[1] In one or two other rare cases the law of divorce favours the wife. For instance, among the Khonds of Orissa she may leave her husband on repaying her price, but may only be divorced for adultery or misconduct. (Dr. Westermarck states that constancy is not required from the wife, and that the husband may be punished for adultery. *Sociol. Papers*, p. 152.) The husband may not strike the wife taken in adultery—a very exceptional rule. (Reclus, p. 281.) These liberties appear to be connected with a scarcity of wives, and with the relics of polyandry. (Reclus, *ib.*)

[2] In addition to the above list, Post, *A. J.*, 400, considers that the position of the wife among the Sarae is equal to that of the husband, and even superior among the Beni Amer and the Galla. But among the last-named he adds that if the husband has once brought home the trophies of a departed enemy, he becomes absolute master. According to Hahn (quoted by Westermarck, *op. cit.*, p. 154), the Khoikhoi (Hottentot) wife is mistress within the house, but according to Kohler, *Z. f. V. R.*, 1902, pt. iii. 344, 355 (speaking of the Hottentots generally), though the wife has a fairly independent position, the husband has the right to chastise her in moderation.

[3] Dr. Westermarck, who objects to the term "subjection" as a general description of the position of women in the lower races, writes: "Among many of them the married woman, although in the power of the husband, is known to enjoy a remarkable degree of independence, to be treated by him with great consideration, and to exercise no small influence upon him. In several cases she is even stated to be his equal, and in a few his superior." (*Soc. Papers*, p. 151.) Admitting this to be the case, we shall clearly be right in persisting that in the great majority of cases women's legal position is inferior. It may be added that considerate treatment is a totally different thing from equality of rights. In his new work on *The Origin and Development of the Moral Ideas*, Dr. Westermarck gives a long list of cases in which the wife's position is more or less favoured. But in comparatively few of them is equality of *rights* asserted, and in still fewer superiority. Even where equal rights are mentioned, the statements with two or three exceptions lack precision. Dr. Westermarck himself says: "All these statements certainly do not imply that the husband has no recognized power over his wife, but they prove that his power is by no means unlimited. It is true that many of our authorities speak *rather of liberties that the woman takes herself than of privileges granted her by custom;* but, as we have seen before, customary rights are always more or less influenced by habitual practice." (P. 646, the italics are mine.) The distinction here admitted cuts deeper than Dr. Westermarck seems to admit. In a relationship so personal and subtle as that between men and women, *de facto* influence and power may develop to the highest pitch, without in the least affecting the recognized rights or status of the sex. A favourite of the harem may sway an empire and yet remain a slave. The frequent statement of

inferiority in her right to property or to the mere protection of life and limb, apart from the fact that the drudgery of life so often falls on her while the men hunt or fight,[1] the prevalence of the capture, purchase and exchange of wives testifies strongly in this direction. The common facility of divorce, even where the conditions are equal to the two parties, tells against the woman, who is the more interested of the two in the permanence of the tie. And very often the conditions are not equal, but favourable to the man. The general permission of polygamy points in the same direction. Lastly, the woman's person is not, strictly speaking, her own property, but that of her husband or guardian, and it is in this sense in the great preponderance of cases that chastity and respect for women are understood in the savage and barbaric world. This peculiarity makes itself felt in many directions. In the first place, wife lending is an extremely common custom among savages. The husband who would kill or mutilate the wife whom he discovered in clandestine intercourse with a lover will also lend her as a matter of courtesy to a guest.[2] In the one case she infringes his right of property, in the other case it is as his

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travellers that the wife rules the household, or that the husband does nothing without consulting her, might have been made of this country in the days when the legal position of the wife was most abject. The power to influence and recognized ethical equality are not only different, but have no necessary tendency to pass into one another.

[1] The extent to which women fill the place of slaves in the rudest societies has perhaps been exaggerated by some writers. Dr. Westermarck (*Sociol. Papers*, p. 150) points out that for the men to fight while the women toil, is a natural division of labour in a world where fighting is a frequent necessity. But this, though it explains, hardly alters the fact that an occupation recognized as inferior falls to the women. (Cf. Westermarck, *Moral Ideas*, pp. 633–637.) There are many variations, and it would be easy to multiply quotations on either side, but on the whole it seems clear that the more toilsome and least esteemed work tends to fall on the women. See the general statements in Ratzel, as to Oceania, vol. i. p. 273; the Malay Region, *ib.* p. 441; North America, ii. p. 129; the Arctic races, p. 225; the Negroes, p. 334; Kaffirs, pp. 432, 433; and the Mongols, iii. p. 341. The position in the two first-named regions is the most favourable, particularly among the more developed peoples.

[2] Numerous instances are given by Starcke (p. 122) and Westermarck (pp. 73, 74). The custom is pretty general among the North American Indians. (Waitz, iii. p. 111. He excepts only the Sioux and the Chippeway.) Cf. Schoolcraft, v. p. 684. Post, *Afrik. Jurisp.*, i. pp. 471, 472, gives numerous instances in Africa. Waitz, v. ii. p. 105, attributes the practice to the Micronesians generally.

property that she is acting.[1] She is not in our modern phrase a person with the full rights of self-respect and respect from others attaching to personality. Secondly, where the obligations of marriage are binding the rules for the unmarried are often very lax. Further, the principal exception to this laxity is constituted by the system of child betrothal, whereby the unwedded girl is already the husband's property.[2] Generally speaking, the requirement of chastity depends on the developed power of the guardian.[3] Thirdly, the claim to fidelity is usually one-sided. While any offence on the wife's part exposes her to punishment, and while

[1] In the Torres Straits any irregular intercourse was called "stealing a woman," and there seems to have been no word for fornication or adultery apart from theft (*puru*). (*Cambridge Expedition*, 275.)

[2] Where the young girls are guarded, precautions are sometimes pushed to disagreeable lengths, as in New Britain, where, between eight and ten, they are put into cages and kept there till they are married.

[3] Post i., pp. 21–23. The first step towards insistence on the chastity of unmarried and unbetrothed girls, is taken when the husband expects virginity at the time of marriage. Unchastity may then become a breach of the proprietary rights of the guardian. Hence it is often punishable, especially if it results in pregnancy. Thus among the Takue, the Marea and the Beni Amer, the seducer who makes an unmarried girl pregnant excites the blood feud, and among the Bogos the full blood price is demanded in such a case. (Post, *Afrik. Jurisp.*, i. pp. 61 and 70.) Among the Wanyamwesi the lover must marry the pregnant girl under a penalty of a fine (Post, *A. J.*, i. p. 458), and in Unyoro she is taken to his house, and, by a characteristic piece of primitive reasoning, he must pay for her if she dies, while if she lives she returns to her father unless the lover pays the bride price. (For other instances in Africa, see Post, *ib.*, p. 459, ii. p. 70, and cf. Letourneau, *La Femme*, p. 48.)

Westermarck (pp. 61–64) enumerates over thirty cases among uncivilized races where unchastity out of wedlock is condemned—but to some of these there are qualifications, *e. g.* among the Gypsies and Kalmucks unchastity is tolerated and it is only the birth of a child that is a disgrace.

In some instances, the unchastity of an unmarried woman is regarded as bringing a curse or some misfortune on the family or the tribe. Thus the Aleuts fear that the whale would punish them if their wives were unfaithful in their absence, or if their sisters were unchaste before marriage. (Reclus, p. 52.) Similarly in Loango, the unchastity of a girl is held to bring a curse on the country (Westermarck, p. 61), and a similar idea seems to underlie the punishment of a pregnant maiden on the Gold Coast, where she is chased by the women to the sea, covered with dirt and ducked, after which she receives charms from the fetishman. (Post, *A. J.*, i. p. 460.) Apparently this is not so much by way of punishment as to avert evil.

With a few exceptions such as these, we may say that among uncivilized races unchastity is regarded universally as an infringement of rights of property, and that generally only the rights of the husband present or future are

an outraged husband may lawfully avenge himself on the man who has trespassed on his property, the unfaithfulness of the husband to the wife is but seldom regarded as an offence.[1] Finally, it is often open to fathers to devote their daughters to prostitution. This is not infrequently a religious duty, and in many cases there are recurring religious festivals of which promiscuous intercourse is a feature.[2]

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considered, but that in some cases the value of a woman is depreciated by the loss of virginity, and this is accordingly regarded as the infringement of the rights of her guardian. The man is of course punished, often with death, for the infringement of these rights. We may find the germ of a different conception in the belief that the unchastity of a man under certain conditions will cause misfortune. Thus the Aleuts above quoted believe that the whale will punish them, not only if their wives are unfaithful, but if they are unfaithful, while on a fishing expedition, to their wives. It is a widely-diffused belief among the North American Indians that unchastity on the war path would bring defeat, and hence captive women are generally spared. For the rare cases in which a husband incurs penalties to his wife for unfaithfulness see next note.

[1] Authorities give one instance to the contrary among African peoples, viz. in Great Bassam. Here the husband pays a fine to the wife if unfaithful to her while she is with the prince. (Post, *Afrik. Jurisp.*, ii. p. 72.)

Among the Hottentots the husband as well as the wife may be flogged for adultery, and except for ill-treatment there is no divorce without the consent of the council. But these observations refer to Christianized tribes. (Kohler, *Das Recht der Hottentotten*, *Z. f. V. R.*, 1902, pp. 344 and 354.)

Among the Mariana the husband could kill an adulteress, but if he on his side were unfaithful, he would be set upon and would be glad to escape with a whole skin. (Waitz, v., ii. p. 106.)

The Sioux and Santal (Dakota) women are said to beat their husbands for unfaithfulness. (Howard i. p. 239.)

According to Dr. Westermarck, among the Shans of Burmah the wife may divorce the husband for drinking or other misconduct, retaining the common property. (Westermarck, *Sociol. Papers*, p. 154.) But Col. Woodthorpe (*J. A. I.*, xxvi. p. 21) states that the Shans of the Upper Mekong follow the law of Manu as to divorce, *i. e.* the wife has no powers of divorce at all. In W. Victoria, as mentioned above (Howard, i. p. 229), a wife may get a slight punishment inflicted on an unfaithful husband, and in some Queensland tribes the women take advantage of the initiation ceremonies to punish men who have ill-treated them. (Westermarck, *Sociol. Papers*, p. 148.) The case of the Khonds has been mentioned above, p. 172, note 1.

As mentioned above, Powers states that among the Karoks of California cohabitation even with a female slave is considered disgraceful. Two or three more similar instances are found among the North American Indians.

We could prolong the above list if we were to add cases in which bringing a second wife or a concubine into the house is a ground of divorce. Broadly speaking, however, in the savage world, under mother-right or father-right, the husband is master of the wife's person.

[2] For instance in Africa, see Post, *Afrik. Juris.*, p. 465. In several Australian tribes the women are common at the corroboree, except to their fathers, brothers or sons by blood. (Spencer and Gillen, p. 97.)

12. All the world over certain forces, ethical, political, economic, and perhaps religious, act from either side upon the relations of men and women. On the whole, apart from a sufficiently strong development of the ethical factors, those which fight for the man, as physically the stronger, have the upper hand. But when there are always forces tending the other way, favourable circumstances will occur here and there to give them peculiar strength. For example, the circumstances attending marriage by service, especially when we compare it with marriage by purchase or capture, have shown us how much the relations of husband and wife are determined by what in the modern world we should call the economic factor. The savage woman's price —if by price we mean the difficulty of appropriating her—may be high or low. Where it is always possible to organize a raid and carry her off it is decidedly low, and she becomes the captor's property. Where this is not countenanced, it is possible to buy her from her guardian, and then presumably her price, like that of other things, is a matter of supply and demand. The actual number of girls born and the practice as to infanticide must affect their value, and we can understand that better treatment of a wife becomes necessary to the husband who wishes to retain her.[1] In other cases the economic value of the woman may be high—for example, where agriculture is becoming important and is still regarded as women's work. In yet other cases women are the repositories of magical lore, and men fear them.[2] These and doubtless other disturbing causes considerably modify the status, nominal or real, of women in the uncivilized world, but the fluctuations which they cause are fluctuations about a centre of gravity which is sufficiently low.

To sum up our account of marriage in the uncivilized world. We have found two distinct forms of the family, the one based on mother-right, the other on father-right. Under mother-right

[1] Hence probably the favourable position often enjoyed by women in polyandrous communities. To us polyandry seems necessarily degrading to a woman. To the women of the polyandrous tribe it means that they are sought after, and therefore prized.

[2] This important suggestion is due to Dr. Westermarck (*Soc. Papers*, p. 159), who is also inclined to lay stress on the economic factor. (On this point cf. Ratzel, ii. 130.)

the woman is undoubtedly the legal centre of the family. From this she sometimes derives certain advantages, such as the power to leave or dismiss a bad husband, or the right to retain her children. But, as a rule, when looked into, her position is found to be inferior. She is held in little respect, and is seldom the owner of the property which passes in her name. The cases in which she enjoys a real equality with men prove on examination to be exceedingly rare. The characteristic of the lower savage life is rather that the family is as yet incompletely organized. Hence the facility of divorce, which is often so great that marriage can scarcely be said to exist, hence also the sporadic appearance of polyandry and partial promiscuity. The advent of father-right implies on the whole a firmer organization. The wife now passes out of the hands of her own kindred, and is appropriated by her husband, whether as the result of capture, purchase or service. Her legal position often becomes semi-servile or worse, and though socially, as among the ancient Germans and the early Romans, she is often held in high respect, her incorporation in her husband's family is often pushed to such an extreme that her subordination does not end with his death. In some instances she follows him to the grave. In others, where she belongs to the family rather than to the individual, she becomes the property of his brother, or of the male head of the clan.

Under both forms of marriage the permission of polygamy is the rule, and divorce is easy for the husband. Under the second form it is generally less easy for the wife. Under both, moreover, it is not merely the wife but the woman that is under tutelage. The civilized conception of the sanctity of woman exists only in germ; her destinies, her freedom and often her life are in many cases at the disposal of her legal guardians. In what ways and by what stages this conception of women and of marriage has been modified by civilized peoples is the question to which we must now turn.

CHAPTER V

WOMAN AND MARRIAGE UNDER CIVILIZATION

1. It is with the Patriarchal type of Family organization, it would seem, that most of the civilized races have started their career in history. The stage of Mother-right is clearly left behind when their history begins. Traces of it remain, like the right of the Mother's Brother in the German Law, but they are mere traces which would be unintelligible if we had not a mass of customs among other peoples by which to interpret them. Whether we look at the ancient laws and customs of India, Persia, Greece or Rome, of the early Celtic and German tribes or the ancient Slavs, or turn to the Semitic and Mongolian civilizations and trace back the Family through Islam to the Arabia of Mohammed's time, through the Old Testament to the days of the Patriarchs, through Babylonian civilization to the Code of Hammurabi, through Chinese literature to the ancient classical books, we find that where civilization is beginning the Family is in some form or other already organized under the rule of the Father.[1] The type of marriage law, of family structure, and for the most part the attitude to woman appropriate to the Patriarchal stage underlie the social history of civilization and are deeply imbedded in its structure. The strongly knit family life, the close personal relations of father, mother and child have formed the nucleus of the stronger and greater social growths. Over a large part of the civilized world the extension of these relations by the family cult and the worship of ancestors, has proved to be a social bond of marvellous strength and endurance. Yet this unity may be purchased dearly by the loss of independence on the part of the individual members of the family, and we have seen how far this is often carried in the barbaric world.

[1] The Egyptian family is perhaps an exception. (See below, p. 188.)

We have now to see how civilization starting in the great majority of cases with this type of family has dealt with the social and ethical problems involved.

In the early civilization of Asia, the position of women, and particularly of married women, was not worse, but on the whole better than one would expect on the analogy of later times and of contemporary civilizations. In ancient Babylon in the time of Hammurabi, *i. e.* probably between B.C. 2250 and 1950, marriage was arranged with the parents without reference to the wishes of the bride [1] by a form of purchase. It was, however, a modified form approaching more nearly to the exchange of gifts which we find in many primitive races. A sum was given, it appears from the code, to the wife's father as well as to the bride herself, but this payment [2] was not universal, and on the other side of the account the father made over to his daughter on her marriage a dowry which remained her own property in the sense that it was returned to her in the case of divorce or on the death of her husband, that it passed to her children, and failing them to her father.[3] Thus the method of marriage appears as a quasi-commercial transaction, and the decision thereon belongs to the parents of the parties.[4] Similar commercial considerations dominate the law of divorce, the leading points of which may be given in the words of Hammurabi's code.

"137. If a man has set his face to put away his concubine who has borne him children or his wife who has granted him children, to that woman he shall return her her marriage portion and shall give her the usufruct of field, garden, and goods, and she shall bring up her children. From the time that her children are grown up, from whatever is given to her children they shall give her a share like that of one son, and she shall marry the husband of her choice.

"138. If a man has put away his bride who has not borne him children, he shall give her money as much as her bride price, and shall

[1] Meissner, *Beiträge zum altbabylonischen Privatrecht*, 13.

[2] The case of marriage without a bride price is contemplated in Hammurabi, section 139 (Kohler, 118), that is to say, if bride price is the right translation, and if it is not rather the sum which, in the regular contract forms, the husband agrees to give the wife in case of divorce.

[3] The dowry might exceed the bride price (section 164). On the other hand, it remained in a sense in the wife's family, as, if children failed, her father regained it on re-paying the bride price (section 163).

[4] See sections 163–6, 159–161.

pay her the marriage portion which she brought from her father's house, and shall put her away.

"139. If there was no bride price, he shall give her one mina of silver for a divorce.

"140. If he is a poor man, he shall give her one-third of a mina of silver."[1]

On the other hand, the woman who "has set her face to go out and has acted the fool, has wasted her house, has belittled her husband," may either be divorced without compensation, or retained in the house as slave of a new wife. The wife may also claim a divorce (or separation)[2] "if she has been economical and has no vice, and her husband has gone out and greatly belittled her," but she acts at some risk, for if on investigation it turns out that she had been uneconomical or a goer about, "that woman one shall throw her into the waters."[3] Thus the wife has certain pecuniary guarantees against arbitrary divorce, while if ill-treated she may leave her husband, but her position as his subject is marked by the manner in which infidelity is treated. The law provides that both parties should be put to death unless the king pardons his servant or the "owner" his wife.[4] The lordship of the husband is seen also in his power to dispose of his wife as well as her children for debt.[5]

[1] I quote Mr. Johns' translation, but following Kohler, have twice substituted bride price for "dowry." It is clearly intended that the unoffending wife shall have not only her dowry, which is really her own property or that of her family (section 162), but either the bride price, which represents, so to say, the worth of her own person, or, what I cannot help suspecting to be the meaning, the amount which at the time of the marriage the husband contracted to give her in the event of a divorce. In the contracts of the period, the sum is specified. In one case it is a mina, in another ten shekels. The wife also states explicitly that if she repudiates her husband she shall be drowned, strangled or sold, as the case may be.

[2] Nothing is said of her being allowed to marry again. She is to go to her father's house. Observe above that when a divorced woman has children it seems to be implied that she will at any rate remain unmarried till they are grown up.

[3] The translations differ here. I follow Mr. Johns. Hammurabi, sections 141, 142, 143.

[4] Hammurabi, section 129. On the other hand, she is allowed to purge herself by oath, from an unproved accusation; if it is made by her husband, "she shall swear by God and return to her house"; if it is made by some one else, she shall plunge into the holy river. (131, 132.)

[5] The period of debt slavery was, however, limited to three years. Hammurabi, 117.

Polygamy appears, not in the rich luxuriance of later Asiatic civilization, but in a restricted form. A man might marry a second wife if a "sickness has seized" his first wife, but the first is not to be put away.[1] Apparently this is the only case in which two fully equal wives are contemplated by the code, but it was also possible for a man to take a secondary wife or concubine, who was to be subordinate to the chief wife. This was a common practice when the wife was childless, but was apparently legal even when she had children.[2]

[1] Hammurabi, 148.

[2] The provisions of the code are not perfectly clear. The relevant sections run as follows:—144. "If a man has espoused a woman, and that woman has given a maid to her husband and has brought up children, that man has set his face to take a concubine, one shall not countenance that man, he shall not take a concubine. 145. If a man has espoused a woman and she has not granted him children and he has set his face to take a concubine, [that man shall take a concubine, he shall cause her to enter into his house. That concubine he shall not put on an equality with his wife." (I have followed Mr. Johns' translation, but substituted "woman" for "votary" in accordance with the views of other translators.) It is not clear from this, as it stands, whether a man could compel his wife to give him a concubine, in case the wife had children, but elsewhere the case of a man having children by both wife and concubine is clearly contemplated, and in the contracts there are cases of a man marrying two wives, of whom one is to be subject to the other. Thus Arad Samas takes Iltani, the sister of Taramka, as his wife. He promises to care for her well-being, and to carry her chair to the temple of Marduk; he is already married to Taramka, but Taramka is placed by the contract in an inferior position to Iltani. "All children," the contract reads, "as many as there are, and as many as shall be born, are Iltani's." If Taramka says to Iltani, "You are not my sister," something terrible happens, as to the nature of which a hiatus in the inscription leaves us in ignorance. If either wife says to Arad Samas, "You are not my husband," she is to be branded and sold for money; if they both do it (presumably if they conspire to do so), they are to be thrown into the river. If Arad Samas repudiates either of them, he is to pay a mina of silver. (Meissner, *ib.*, p. 71.) In this contract, essentially the same law as that of Hammurabi is seen in active operation, and it is clear that a certain form of polygamy or concubinage is contemplated, although there are children in existence by the first wife. Apparently the object of the code is to maintain the supremacy of the chief wife, while imposing on her, if childless, the duty of granting children to her husband. The concubine should be provided by her. If she failed to give him one, the man might take one, but must still treat his wife as mistress of the home. There is no prohibition of concubinage merely on the ground that the legitimate wife has children of her own. Further it is only the regular concubinage with a fixed status, determined by contract, which is thus limited. There is nothing said to limit intercourse with a female slave, whose children might be adopted at will by the father, and thus share in the inheritance with the legitimate children. (Hammurabi, 170, 171.) On the whole we gather

To sum up, the early Babylonian marriage law contemplates marriage by purchase or exchange of gifts with a restricted polygamy and considerable authority and privileges for the husband, moderated by certain provisions for the protection and maintenance of the wife. But in relation to other persons the wife is a much more free agent than in many civilized countries at the present, or at any rate in recent times. She could already conduct business and in certain cases dispose of property, and, at any rate in later Babylonian times, she appears as possessed of full legal personality, carrying on processes of law and appearing as a qualified witness.[1] In this later period moreover—that of the last centuries of the independent Babylonian civilization—it appears from the contracts that a woman could protect herself against the advent of a second wife by pecuniary penalties in the marriage contract.[2] On the other hand, her marriage still appears to be at the disposal of her male relations, her brothers, for instance, when the father was dead. Indeed, even the son required the father's consent to his marriage. To this extent the patriarchal power had endured.[3]

2. In ancient Egypt a good deal of obscurity surrounds the position of women. We have to re-construct it partly from marriage contracts which perhaps do not show us all the conditions of the bargain, partly from incidents in stories, partly from passages in the moralists, partly from the descriptions of

(1) that, in case of sickness, there might be two regular wives; (2) there might be in case of childlessness, and perhaps in other cases also, a regular concubine, subordinate to the wife; (3) a slave concubine unprotected by contract, whose children might or might not be recognized and inherit.

[1] Kohler and Peiser, *Aus dem Babylonischen Rechtsleben*, iii. p. 8, etc. The marriage law had also improved in the wife's favour. Contracts of marriage by purchase are very rare, though one exists of the thirteenth year of Nebuchadnezzar, in which the wife is bought for a slave for 1½ gold minas. (*Ib.*, vol. i. p. 8.)

[2] The husband promises if he takes another wife to give her a mina and send her home. This seems to have been a common protection against polygamy. The wife still engages to be put to death, if unfaithful (Kohler and Peiser, i. 7, 8. Cf. Victor Marx, *Die Stellung der Frauen in Babylonien; Beiträge zur Assyriologie.* bd. 4, hft. i. p. 5, seq.)

[3] Kohler and Peiser, i. p. 9, and ii. p. 7. The right of the father is limited in Hammurabi. He might only disinherit a son for a serious crime, and then only for a second offence, and with the approval of a judge. (168, 169.) In other words, the property was the family's, and the father had only limited rights over it

Greek travellers. We have no precise and certain information as to the structure of the family, on which everything turns; and we are dealing with a period of four thousand years or more, in the course of which there is time even in the slow-moving East for many things to change. In fact, our fullest information relates to the very latest period of independent Egyptian history, and to the time of the subjection to Persians, Greeks and Romans. This information is derived from numerous marriage contracts, a few of which are as early as the time of King Bocchoris (*circa* B.C. 730), while the greater number are of Persian and Ptolemaic times. In this period there was no sale by the parents,[1] but the bride gift went to the bride herself, and the husband in the contract further stipulates how much he will give for her support, and promises that the children shall be his heirs. The woman's own property remains generally at her disposal, and she retains the right in the contracts of leaving her husband and keeping her property together with the bride gift. She also can secure herself against divorce by a fictitious dowry which the husband is to pay back [2] to her in case he sends her away.

Such contracts appear to be wholly in favour of the woman, and in the light of them we can understand the statement of Diodorus that among the Egyptians the wife ruled the husband, though he clearly exaggerates when he says that in the marriage contract there was a specific agreement that the husband should in all things obey the wife.[3] This, however, gives us one side of the shield only. The very fact that the wife protected herself from divorce or from the marriage of a second wife by special clauses in the marriage contract goes to prove that she was not so pro-

[1] Nor do they appear in the contract. Yet probably their authority was or had been at least in theory absolute, even over the son. (Revillout, *Précis du droit Égyptien*, p. 1102.) In the story of the enchanted princess, the daughter only gets her own way by threatening suicide. (W. Max Müller, p. 3.)

[2] W. Max Müller, *Liebespoesie der alten Aegypter*, p. 4 ff.

[3] Diodorus, i. 27. *παρὰ τοῖς ἰδιώταις κυριεύειν τὴν γυναῖκα τὰνδρος, ἐν τῇ τῆς προικὸς συγγραφῇ προσομολογούντων τῶν γαμούντων ἅπαντα πειθαρχήσειν τῇ γαμουμένῃ.* Some instances are, however, quoted of post-nuptial gifts in which the husband makes over all his possessions to his wife, on condition that she is responsible for his maintenance throughout life and for his tomb. (Revillout, 1092.) Cf. also the contract of Panofré, in which, seemingly, full power is given to the wife and none to the husband. (*Ib.*, 1005.) M. Revillout regards this as a compensation for seduction.

tected by the general law, and in point of fact there is evidence in the monuments and in the popular stories both for polygamy and for looser unions admitting arbitrary divorce. Thus in the story of the Squinting Woman we read that "she was twenty years in the house of her husband. When he found another woman he said to her, 'I divorce you, you squint.'"[1] Presumably the poor lady had not taken the precaution to protect herself by a marriage contract, or perhaps she had not the means to do so, for naturally conjugal rights resting upon considerations of property could only be enforced among the propertied classes, and probably only there in cases where the wife's dower was a substantial consideration. And if, as good authorities[2] hold, this pecuniary security against the possibility that the husband "should be averse to her and seek another wife" formed the chief difference between the wife and the mistress, we can easily understand how it was that much looser relations remained the rule both in the highest classes and among the mass of the people. The privileged position which the wife occupies in the contracts would seem, then, to arise largely from considerations of property and inheritance, though based also on the freedom of the Egyptian woman to carry on commerce and industry and to make contracts for her own benefit. With this freedom, which is very possibly associated with a general breakdown of an older joint family system about the epoch of Bocchoris, she—or her father on her behalf—is enabled to bargain either for the fidelity of her husband or for freedom for herself to leave him—in some cases even for both together[3]—her property being secured to her and the children of the marriage. Apart from such a bargain, if this view is accurate, her position would be a very different one.[4]

[1] W. Max Müller, *l.c.*, p. 5.

[2] How completely the terms of the contract were determined by the position of the parties and the conditions of the bargain is shown by the fact that from the very same period we get contracts in which the wife hands herself over as a slave, with all her belongings down to the clothes on her back. The man merely promises not to take a concubine. (Revillout, p. 996.) In some contracts, again, the wife pledges herself, if she leaves the husband, to restore all his gifts tenfold. (*Ib.*, 1002.)

[3] See Revillout, *Précis du droit Égyptien*, p. 1029, and cf. Müller, p. 4.

[4] In the interpretation of the contracts everything really turns on the dowry. If this is *real* the whole position is readily intelligible. The husband receives (as the contracts recite) so much from the wife. But he

Polygamy appears to have been allowed from the first, though as in almost all polygamous countries it was for the most part confined to the rich. The king has a large harem in which there is one chief wife, the "great spouse," who accompanies the king in his public acts and particularly in his religious worship, who is always a princess of the royal blood, and probably a sister of the king, who has her own household and her own servants, and might on the king's death obtain practical

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holds it in trust for her, to pay her a fixed income from it while she is his wife, or, if she leaves him, to refund it. She keeps the property in case of divorce because it was originally hers, and has throughout been held for her. Moreover, the property is settled on the children of the marriage, and it appears to be in their interest as much as the wife's that the contract is made. So far the only important right of the wife is that of free separation. If, however, as seems to be held by Revillout, p. 1079, and Müller, the dowry was often fictitious, the bargain was certainly favourable to the woman in a remarkable degree. In that case we must suppose that as a condition of marriage, she exacted the settlement of a man's whole property on herself and children, retaining full liberty of leaving him at will, and taking the property with her. Is this credible? Such a settlement occurs in the Setne story. Ta-bubue makes her would-be seducer first execute a deed in her favour: she then calls in his children to witness it, and finally makes him kill them. This, however, belongs to the region of fairy tale. It seems far more probable that in the normal case, the free position of the wife was (as later in Rome) simply purchased by the dowry. In the Theban contracts there is no dowry, and nothing is said of divorce by the woman. On the other hand, the man makes a nuptial gift and agrees to increase it five, ten or twenty fold if he takes another wife. The property is settled on the children in the name of the eldest son. (Revillout, pp. 1034, 1039, ff.) Revillout recognizes (p. 1096) that the interests of the children were the prime object of the settlement, and if so the contract merely enforces by agreement what would have occurred automatically under a joint family system with maternal kinship. The daughter inheriting property from her parent marries. The husband becomes its administrator, but not its owner. It passes automatically to their children with the eldest as administrator. If the wife dismissed the husband (as under this system she often may) she would of course retain the family property. Now if this system was breaking down in the age of Bocchoris in favour of individual ownership, it would be necessary to secure the passage of the property to the woman's children by a compact. This was done by making it over to the nominal ownership (and perhaps real administration) of the husband, who agreed that it should return to the wife in case of divorce, and in any case pass to their children. Thus the old system of inheritance would be maintained by the new method of contract. It is, of course, possible that where the woman had the man in her power, like the witch-wife in the story of Setne, she would use this form for getting hold of all his worldly goods. The Theban form of contract is less archaic. Here there is a Morgen-gabe to the bride, but only an earnest of it is actually paid over. The remainder is to be given if the husband is unfaithful, and so acts as a guarantee for her.

royal authority as regent. Under her there are secondary wives taking rank according to their birth, and being probably more or less secluded, and beneath them again are a troop of concubines and foreign slaves.[1] The court of Pharaoh was imitated by the feudal chief of every nome, who also had his harem, "where the legitimate wife—often a princess of solar rank—played the rôle of Queen surrounded by concubines, dancers and slaves." [2] Thus a frank development of polygamy, though apparently in that form in which the position of the chief wife is clearly distinguished, was practised by the highest classes of Egypt, and it is seldom, if ever, that polygamy on a large scale goes much further. It would seem, however, that the position of women gradually improved through Egyptian history, and that in practice polygamy died out. In the Middle Kingdom it appears frequently among the middle classes, but by B.C. 1100 it had become rare, and later on it died away except among the higher officials.[3] While it was still clearly legal in the New Kingdom and in the Classical Period the contracts enable us to understand how through the opposition of the women it would gradually disappear. But meanwhile the whole attitude to women must have improved. In the early dynasties the king boasts of having carried off the wives of other men, and these outrages are alleged in proof of his truly royal nature.[4] Now though in theory Pharaoh may have remained the absolute master of all his subjects and their wives, yet rape and adultery did not continue to be a matter for boasting. For the ordinary man, at any rate, they were recognized as sins from which he had to clear himself in the next world.[5]

[1] Maspero, *Dawn of Civilization*, 270, 271 ff.

[2] Maspero, *op. cit.*, 298.

[3] Thus as late as B.C. 40 a high priest, recounting the advantages which he had enjoyed in this life, says: "I had beautiful concubines." (W. Max Müller, p. 5, note 11.)

[4] Maspero, *Recueil de Travaux*, vol. iv.; *Pyramide du roi Ounas*, p. 76.

[5] Thus, in the Negative Confession in the *Book of the Dead* of the 18th Dynasty, violations of the marriage law figure as mortal sins. The Negative Confession (Flinders Petrie, *Religion and Conscience in Ancient Egypt*, pp. 134, 135) consists of a long series of offences which the dead man repudiates. The 19th reads: "I have not committed adultery with another man's wife." The next is by some translated: "I have not been impure," which would look like a general repudiation of unchastity rare in

On the relations of husband and wife the moralists of the Middle and New Kingdom throw some light. They very properly enjoin kind treatment of the wife upon the husband. To this effect run the precepts of Ptah Hotep: "If thou art successful and hast furnished thy house and lovest the wife of thy bosom, then fill her stomach, and clothe her back. The medicine for her body is oil. Make glad her heart during the time that thou hast. She is a field profitable to its owner." [1] These are most proper sentiments, blended, as they are, with that simple worldly wisdom and gentle appeal to self-interest which characterize the utterances of the excellent Ptah Hotep, first of all the race of platitudinarians; but excellent as the sentiment is, it does not imply the subjection of the husband to the wife, but rather the contrary.[2] The maxims of Ani, some six dynasties later, are a little more detailed: "Do not treat rudely a woman in her house when you know her perfectly; do not say to her, 'Where is that? bring it to us,' when she has set it perfectly in its place which your eye sees, and when you are silent you know her qualities. It is a joy that your hand should be with her. The man who is firm of heart is quickly master in his house." [3] All this is in

early ethics. But Müller (p. 17) renders it: "I have not stimulated sensuality," *i. e.* by drugs. In the earlier lists of repudiations (there are two in the *Book of the Dead*) is one translated by Mr. Budge (*Book of the Dead*, ii. p. 361): "I have not committed fornication," but other renderings seem to limit the offence to cases where it was committed in a sacred place. (Griffith, p. 5321.) As to women Müller (p. 7) thinks that pre-nuptial chastity was little regarded, and this would certainly fall in with the abnormal permission of brother and sister marriage. He adds that in the marriage contract no stress was laid on virginity, and that, at least in Roman times, there was no prejudice against bastards. The unspeakable corruption of the Egyptian Pantheon to which he refers would reflect the manners of the earliest period.

[1] Flinders Petrie, p. 132. F. L. Griffith, *The World's Literature*, p. 5335.

[2] There is a little more point in a further maxim of Ptah Hotep, "If thou makest a woman ashamed, wanton of heart, whom her fellow-townspeople know to be under two laws (explained by Mr. Griffith as meaning in an ambiguous position), be kind to her a season; send her not away, let her have food to eat. The wantonness of her heart appreciateth guidance." (Griffith, *World's Literature*, p. 5337.) Apparently this is a recommendation, couched, it must be admitted, in mild terms, to a man who has seduced a woman to treat her with consideration. There is clearly no question of any obligation.

[3] The Boulak Papyrus, in Amélineau, *La Morale Egyptienne*, p. 188. Brugsch translates the first words: "Do not strike your wife." With the above compare the Ptolemaic precept, "May it not happen to thee to mal-

the approved Oriental style, and so also is Ani's recommendation to the wife: "What does one speak of day by day? Let the professions speak of their duties, the wife of her husband, and every man about his business." [1]

In what sense, then, was the wife called "mistress of the house"? Possibly this was merely the title of the legitimate wife as opposed to the concubines. Possibly the true explanation is that advanced by Maspero,[2] that, as in some contemporary tribes of Northern Africa, the practice of polygamy took the form that each wife had her own house in which she was mistress, and "where she performed all a woman's duties, feeding the fire, grinding the corn, occupying herself in cooking and weaving, making cloth and perfumes, nursing and teaching her children. When her husband visited her, he was a guest whom she received on an equal footing. It appears that at the outset these various wives were placed under the authority of an older woman, whom they looked on as their mother, and who defended their rights and interests against their master, but this custom gradually disappeared, and in historic times we read of it as existing only in the families of the gods." [3]

With this system probably survivals of primitive mother-right were conjoined. Descent was reckoned through the mother down

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treat thy wife whose strength is less than thine, but may she find in thee a protector." (Flinders Petrie, p. 133.) We have also the lament of a widower who is persecuted by his wife's ghost, and who points out that he never left her when he obtained promotion, but shared everything with her, and never acted the master. (Revillout, p. 984.) This implies that he might have done so. On the other hand, it points to another possible source of respect for women, the fear of the ghost or of their magic power. This last was strongly felt. (Maspero, *Dawn of Civilization*, p. 271.)

[1] *Maxims of Ani*, § 30. Amélineau, *La Morale Egyptienne*, 113. It should be added that the husband could apparently put the unfaithful wife to death. In the story of the "Two Brothers" it is narrated without comment, and rather as a matter of course, that the husband slew his wife and cast her to the dogs. (Griffith, *World's Literature*, 5257.) According to Diodorus, in cases of adultery, the paramour was punished with 1 000 blows, the wife by having her nose cut off. (I. 78. 4.)

[2] Maspero, *Dawn of Civilization*, p. 51 ff.

[3] The same practice is found among Columbian tribes where the husband goes to live in the wife's tribe. She takes charge of the house and the provisions, and there may be several wives, each with her separate fire. (Starcke, *The Primitive Family*, p. 34.) The contracts of the classical period appear to contemplate the separate life of the parties, pursuing their several avocations, and the husband agreeing to allow so much for his wife's maintenance.

to late times, and guardianship was exercised by the mother's brother.[1] That being so, it is intelligible that the family property should pass through the female and be retained by her in case of divorce. Honour to the mother is strongly insisted on.

"Thou shalt never forget thy mother, and what she has done for thee, that she bore thee, and nurtured thee in all ways. Wert thou to forget her then she might blame thee, lifting up her arms unto God, and He would hearken unto her complaint. For she carried thee long beneath her heart as a heavy burden, and after thy months were accomplished she bore thee. Three long years she carried thee upon her shoulder and gave thee her breast to thy mouth. She nurtured thee nor knew offence for thy uncleanness. And when thou didst enter school and wast instructed in the writings, daily she stood by the master with bread and beer from the house."[2]

Thus it is very possible that the preservation of relics of mother-right was among the forces tending to the better condition of women in Egypt. These were augmented towards the close of the independent history of Egypt by the rise of free contract and the important part taken by women in industrial and commercial life. In these relations and in social intercourse generally it is allowed on all hands that their position was remarkably free. Little restraint was placed on their intercourse with men, they appear on the monuments eating and drinking freely—sometimes too freely—in masculine company, and they surprised the Greek travellers by going out without restraint to work at their trade or manual labour while the men often worked at home.[3] Of this position women in

[1] W. Max Müller, *Liebespoesie*, p. 6.

[2] From the Boulak Papyrus, translated by Griffith, *op. cit.*, p. 5340, from the German of Professor Erman.

[3] W. Max Müller, *loc. cit.*, points out that this freedom would not apply to the bondwomen of the peasantry, who were under the arbitrary power of royal or priestly officials, and wove for them shut up in a work-house. Here, however, we touch the general question of slavery rather than the special position of women. It is more to the point, that to have refrained from pressing a widow remained a matter for boasting, and that education in reading and writing was not often extended to girls. It is perhaps going a little too far to say with this writer that no ancient or foreign people, except those of New Zealand, have given women so high a legal position. The attitude to women in Egyptian literature is not particularly respectful. Often she is represented as the temptress, for instance in the Boulak Papyrus. "Keep thyself from the strange woman who is not known in her city.

the commercial and propertied classes availed themselves to improve their condition as wives. But apart from marriage contracts which were perhaps restricted to a limited class for a limited period, the position of the Egyptian woman was probably, save for the remainders of mother-right, much what it has been elsewhere in the East—subject to her guardian's choice of a husband,[1] liable to be slain for unfaithfulness, subject to divorce at pleasure, and to have other wives or concubines associated with her. Out of this condition the women of Egypt at the close of its independent civilization were raising themselves by the marriage contract, and one class had so far succeeded as to achieve a position equal to that of the Roman matron at a later day.

3. Both in Egypt and Babylonia the position of women was in some respects better than our traditional conception of the Oriental woman would lead us to expect. In other cases that conception accords only too closely with the facts. Each civilization has had its own peculiarities, but they have been variations upon one type. In India tradition starts with the heroic age of the Vedas, in which the paternal power is already fully developed. The father is master and indeed owner of the family; wife, sons, daughters and slaves have no property of their own, but are rather his property. On his death, his place is taken by the eldest son, into whose tutelage the widow passes. The daughter might be sold to an intending husband,[2] and it is not probable

Look not upon her when she cometh and know her not. She is like a whirlpool in deep waters, the whirling vortex of which is not known. The woman whose husband is afar writeth unto thee daily. When none is there to see she standeth up and spreadeth her snare. Sin unto death is it to hearken thereto." (Griffith's tr. following Erman, *World's Literature*, p. 5340.)

The general tendency of the passage, which recalls the well-known chapter in Proverbs, is plain enough, but whether the warning is principally directed against the harlot or the adulteress is not wholly clear.

[1] In the 12th dynasty women were definitely part of the family property, a man's widow being counted among the possessions inherited by the son. (Revillout, *Précis du Droit Égyptien*, p. 990.) Here there was apparently a decided change by the time of Bocchoris, a change which naturally accompanies the break-up of the joint family.

[2] The purchase of brides is mentioned in the Epic Poems. Thus Bhishma purchased the daughter of the Prince of Madras for Pandu, with gold and precious stones. (Duncker, *History of Antiquity*, vol. iv. pp. 255–266.) Capture was probably an alternative to purchase, *l. c.*

that her consent was a material condition.[1] The widow passed to her husband's brother until a son was born: she did not in this age follow her husband to the grave, though the funeral ceremony strongly suggests the previous existence of such a custom.[2] Finally the Vedas contain distinct traces of polygamy, though it was doubtless an exception.[3] Thus Indian family life begins with a typical Patriarchate. To this system a religious turn was given by the Brahman law. In some respects the Brahmans endeavoured to purify the marriage relationship and to provide for the protection of the wife. This appears especially in the attempt to prohibit marriage by purchase. This form of marriage is recognized, but figures along with marriage by capture as one of the four blamable kinds, and "no father who knows the law must take even the smallest gratuity for his daughter." He that does so is "a seller of his offspring."[4] Purchase is reduced to

[1] Muir, *Sanscrit Texts*, v. 459, quotes a passage from the Vedas, which suggests that some freedom of choice was exercised by women under favourable conditions. "Happy is the female that is handsome. She herself loves (or chooses) her friend among the people." In the Mahabharata the King's daughters appear to choose their husbands, but this is a prerogative of Royalty.

[2] When the widow has led her husband to the place of burial, she is exhorted to "elevate herself to the world of life," for her marriage is at an end. (Duncker, *op. cit.*, iv. 511.)

[3] In one hymn the poet prays that Pūshan will protect him and provide him with a supply of damsels. (Muir, v. 457, 461.)

[4] Manu's eight forms of marriage and his comments on them are full of instruction for the transition from barbaric to civilized marriage laws. The gift of a daughter, after decking her, to a man learned in the Veda and of good conduct . . . is called the Brâhma rite. The gift of a daughter who has been decked with ornaments to a priest . . . they call the Daiva rite. When (the father) gives away his daughter according to the rule after receiving from the bridegroom, for (the fulfilment of) the sacred law, a cow and a bull or two pairs, that is named the Ârsha rite. The gift of a daughter (by her father) after he has addressed (the couple) with the text, "May both of you perform together your duties," . . . is called . . . the Prâgâpatya rite. When (the bridegroom) receives a maiden after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called the Âsura rite. The voluntary union of a maiden and her lover one must know (to be) the Gândharva rite, which springs from desire, and has sexual intercourse for its purpose. The forcible abduction of a maiden from her home, while she cries out and weeps, after (her kinsmen) have been slain or wounded and (their houses) broken open, is called the Râkshasa rite. When (a man) by stealth seduces a girl who is sleeping, intoxicated, or disordered in intellect, that is the eighth, the most base and sinful rite of the Pisâkas. (Manu, iii. 27–34.) Of these, the first four are allowed to Brahmans. They are all in effect religious marriages, the gift in the third or Arsha form being of a ceremonial character, as it is to be "for

the form of a fee given to the Brahman for the fulfilment of the sacred law, and this fee is not to be appropriated by the relatives themselves. Yet notwithstanding Manu's discouragement of the practice, marriage by purchase persisted in a modified form, the final compromise being that the present given by the suitor was assigned to the benefit of the bride and became her dowry, passing back to her own family on her death. The barbaric form of marriage by capture or abduction, which is morally condemned by Manu but legally sanctioned for the Kshatriya caste, became obsolete, being forbidden in Narada's code, and the two forms of marriage which persist in India to this day are the Brahma, the gift of a daughter decked and honoured with jewels to a man learned in the Veda whom the father himself invites, and the Asura, or purchase in the modified form described.[1]

Only in one case, moreover, does Manu recognize the free-will of the maiden in the matter of her own marriage. If her father fails to provide her with a husband within three years of her attaining maturity she may marry whom she will.[2] In all other cases her guardian disposes of her hand. The woman who is thus passed from the absolute control of her father into the absolute control of her husband must honour, obey and merge herself in him. "Though destitute of virtue, or seeking pleasure (elsewhere), or devoid of good qualities, (yet) a husband must be constantly worshipped as a god by a faithful wife."[3] "She must always be cheerful, clever in (the management of her) household affairs, careful in cleaning her utensils, and economical in expenditure."[4] On his side the husband is commanded to show her respect. "Women must be honoured and adorned by

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the fulfilment of the sacred law," not a price for the daughter. A variant appears in the code of Apastamba (II., vi. 12, 13, Mayne, p. 82), wherein a gift of value was made to the bride's parents, but returned by them. The four blamable rites are purchase, capture, voluntary union, and treacherous seduction. Of these, the two first, as we have seen, are allowed to the warrior caste. The fifth and eighth, the law book of Bauddhayana allows to Vaisyas and Sudras, since they "are not particular about their wives." (Baud., I., ii. 13, 14.) These are in the main relics of barbarism, yet a higher conception appears when Bauddhayana remarks that "some recommend the Gandharva rite (*i.e.* voluntary union) for all castes, because it is based on mutual affection." (*Ib.*) But this germ of a true marriage by mutual consent was not allowed to fructify.

[1] J. D. Mayne, *Hindu Law and Usage*, pp. 79–85.

[2] Manu, ix. 90 ff. [3] Manu, v. 154. [4] Manu, v. 150.

their fathers, brothers, husbands, and brothers-in-law, who desire (their own) welfare."[1] He is to be faithful to her, "being constantly satisfied with her alone." Her son is even to respect her more than his father. "The teacher is ten times more venerable than a sub-teacher, the father a hundred times more than the teacher, but the mother a thousand times more than the father."[2] And so Vasishtha says, "A father who has committed a crime causing loss of caste must be cut off. But a mother does not become an outcast for her son."[3] But though respected if virtuous, she is to be chastised if the husband thinks her otherwise. The chastisement, however, is strictly limited. "A wife, a son, a slave, a pupil, and a younger brother of the full blood, who have committed faults, may be beaten with a rope or split bamboo, but on the back part of the body (only), never on a noble part; he who strikes them otherwise will incur the same guilt as a thief."[4] Here, as elsewhere, fluctuations of opinion show through Manu's text. In one place we read, "Day and night women must be kept in dependence by the males of their families,"[5] yet a few sections on the appeal is to women themselves: "Women confined in the house under trustworthy and obedient servants are not (well) guarded; but those who of their own accord keep guard over themselves are well guarded."[6] But this higher note is seldom struck. The Brahmans are far too much impressed with the evil disposition of women,[7] and the husband is recommended to keep his wife well employed about the house keeping things clean and preparing his food, as an expedient for guarding her.

On the strict theory of Manu a wife could have no property. In this respect she is placed on one footing with a son and a slave.[8] The wife could not leave her husband under any circumstances, but he might take other wives and might "supersede" rather than divorce her if she "drink spirituous liquor, is of bad conduct, rebellious, diseased, mischievous or wasteful." Further: "A barren wife may be superseded in the eighth year, she whose

[1] Manu, iii. 55. [2] Manu, ii. 145. [3] Vasishtha, xiii. 47, 48.
[4] Manu, viii. 299, 300. [5] Manu, ix. 2. [6] Manu, ix. 12.
[7] When creating them, Manu allotted to women (a love of their) bed, (of their) seat and (of) ornament, impure desires, wrath, dishonesty, malice, and bad conduct. (Manu, ix. 17, and see the whole passage, 13–18.)
[8] This, however, is not carried out consistently. (Manu, ix. 194.)

children all die in the tenth, she who bears only daughters in the eleventh, but she who is quarrelsome without delay." "But a sick wife who is kind to her husband and virtuous in her conduct, may be superseded only with her own consent and must never be disgraced."[1] There are indeed traces in the text of Manu, on the one hand, of a custom allowing deserted wives as well as widows to marry again, and, on the other, of an idealistic attempt to establish indissoluble monogamous marriage. But these remain as traces only. What the Brahmans actually succeeded in doing was to prevent the re-marriage of women even after the death of their husbands, while men obtained the right to take as many wives as they pleased, though they might not dismiss any existing wives save for one of the faults enumerated.[2] Such having been the position of the wife during the husband's lifetime, after his death she must remain faithful to him, "she must not even mention the name of another man after her husband has died."[3] She is now under the tutelage of

[1] Manu, ix. 80–82.

[2] Manu, always liberal in inconsistencies, is more than usually so on this point. The cause, as shown by J. D. Mayne, is clearly mutilation of the text in the interest of conflicting views. Thus in ix. 46, 47, we read: "Neither by sale nor by repudiation is a wife released from her husband. . . . Once is the partition (of the inheritance) made, (once is) a maiden given in marriage, etc." From this it is clear that the repudiated wife could not re-marry. Further it seems that the attempt was being made to impose monogamy and conjugal fidelity on the husband as well. "Let mutual fidelity continue unto death, this may be considered as the summary of the highest law for husband and wife." (ix. 101.) Connect this with v. 168. "Having thus, at the funeral, given the sacred fires to his wife who dies before him, he may marry again, and again kindle the (fires)." This seems to imply monogamy with mutual fidelity as the ideal, but in other parts a plurality of wives is freely contemplated, and in ix. 77–82, the dismissal of a wife is permitted on several conditions as shown in the text. Further Mayne, *Hindu Law and Usage*, p. 93, shows conclusively that a passage has been omitted before ix. 76, justifying a wife in marrying again after desertion for a period of years. Thus we trace (1) a period when widows and deserted wives may marry again, (2) an attempt to establish monogamy. But the net result of this sacramental conception of marriage, impinging on actual law and usage, was, in the Brahmanic codes, the greatest liberty for the man, and the most complete bondage for the wife.

[3] Manu, v. 157. On the other hand, not only is suttee not mentioned by Manu, but the original text appears, as we have seen, to contemplate re-marriage. (See especially ix. 175, 176.) Among the Jats of the Punjab, re-marriage is allowed to the deserted wife and to the widow; in Western India, it is allowed to the lower castes if the husband is impotent, if the parties are continually quarrelling, or if, by mutual consent, the husband breaks the wife's neck ornament, or if he deserts her for twelve years. (J. D.

her son, for a woman is never a free agent. "By a girl, by a young woman, or even by an aged one, nothing must be done independently, even in her own house. In childhood a female must be subject to her father, in youth to her husband, when her lord is dead to her sons; a woman must never be independent."[1]

The chastity of women was to be preserved by their seclusion, and their unfaithfulness punished by their husbands. We have seen that in the barbaric world the infringement of chastity is regarded mainly as an offence against the woman's owner. The influence of this conception is still apparent in the Brahmanical codes, which, in assigning punishments for seduction and adultery, observe a marked distinction between the cases where the woman is properly guarded and those in which she is free from proper surveillance.[2] The same conception had another

Mayne, *op. cit.*, 94, 95.) Polygamy, on the other hand, as to which the earlier text of Manu seems to have wavered, remains to this day an undoubted right. On the whole, we may say that nowhere has the subjection of women been more complete than in India, and Mohammedan influence, far from improving matters, has only furthered the practice of seclusion.

[1] Manu, v. 147, 148.

[2] For a scale of penalties modifiable according as the woman is guarded or not, see Manu, viii. 374 ff.

On the subject of legal punishments and religious penances for different forms of immorality, Manu is quite bewildering in his divergencies of statement, and the case is made worse if the other Brahmanist law books are consulted. Two instances may suffice to illustrate the difficulty of extracting a consistent view. In viii. 371, the king is to cause the adulteress to be devoured by dogs. But in xi. 177, "an exceedingly corrupt wife" is merely to be confined to one apartment and to perform the penance prescribed for males in the case of adultery. Probably the explanation is that the first passage which speaks of a wife "proud of the greatness of her relatives" lays down the penalty for high caste women who love men of lower caste. This is explicitly stated in the corresponding passage of Gautama's code (xxiii. 14, 15). But there is nothing in Manu himself to clear up the point. Again, in xi. 59, intercourse with unmarried maidens is somewhat strangely classed with the deadliest of all sins—violation of the Guru's (teacher's) bed—but in § 62 it is classed among minor offences causing loss of caste.

I shall not attempt to thread my way through the maze, but will note a few salient points:

(1) Considering the low position of women, the punishments of immorality, where no caste complication is involved, seem moderate. It would seem as though but little responsibility were attached to the woman. Thus the maiden who makes advances to a man of high caste is not to be fined, only if he is of lower caste is she to be confined to her house (viii. 365).

(2) A low caste seducer suffered corporal punishment. One of equal caste had to pay the nuptial fee if demanded by the woman's father.

consequence, paradoxical enough in our eyes. As the husband was the proprietor of the wife, he was also the owner of her children, whether they were his children after the flesh or not. And as children were a desirable acquisition for the purposes both of this world and the next, it was not unusual for a childless husband to compel his wife to bear him a child by another man. In the Mahabharata we read that wives who refuse such a duty are guilty of sin. It was through a similar order of ideas that if the husband died childless his brother[1] was appointed to raise up seed to him. This, of course, was for religious purposes only. The son of the appointed lover, on the other hand, was the son for this world as well as the next. But with the progress of civilization the Niyoga, as this custom was called, gradually fell into discredit and made way for a purer conception of the relations of husband and wife. It deserves mentioning here as one of the most remarkable paradoxes in the field of Comparative Ethics that the same teaching which insists so strongly on the guarding of women as though the preservation of their persons for the benefit of their owners were the sole object of their existence, should also say of adultery that "men who have no marital property in women, but sow their seed in the soil of others, benefit the owner of the woman."[2] But the paradox resolves itself into this, that proprietary right rather than personal self-respect and love is deemed the basis of conjugal obligation. Property is more than personality, and it is precisely this that is characteristic of Oriental as on the whole of primitive marriage.

4. Turning from India to China, we do not find much change in the position of the woman. The arrangement of marriage

(3) Adultery and fornication appear as religious offences (xi. 59 seq.).

(4) The husband's right to kill an unfaithful wife is substantially recognized—the penance required being only to give a leathern bag, a bow, a goat, or a sheep, according to her caste. (Manu, xi. 139.)

[1] The Levirate is usually connected with the principle that the widow belongs to her husband's family, and probably this was its historical origin in India. But in Manu it rests on religious considerations and is reduced to the dimensions necessary for religious purposes. The brother must only cohabit with the widow so far as is necessary for the purpose of raising up seed to his brother (Manu, ix. 60), and the whole practice is forbidden in the passage 64–68, which contradicts the clauses permitting the Niyoga.

[2] Manu, ix. 51.

is in the hands of the parents, and the son is as much at their disposal as the daughter.[1]

"Young people," says the Editor of the *She-King*,[2] "and especially young ladies, have nothing to do with the business of getting married. Their parents will see to it. They have to merely wait for their orders. If they do not do so, but rush to marriage on the impulse of their own desires and preferences, they transgress the rules of heaven and violate the law of their lot." The marriage is, in fact, arranged by go-betweens who form a kind of profession, and as it is now, so was it perhaps three thousand years ago in the days of the *She-King*.[3]

The full ceremony of marriage is, as a rule, gone through with only one woman; bigamy or the raising of a concubine to the rank of wife is punished by ninety blows[4] (unless in certain exceptional cases), but there are secondary wives or concubines who owe obedience to the first wife, and it is a point much insisted on in the classical books that the head wife should show no jealousy of her inferiors.[5]

[1] Chinese travellers note relics of marriage by capture in the ceremonial and point out that the ideograph for slave is compounded of "woman" and "hand," implying that the woman is the type of that which, in the phrase of the Koran, "your right hand possesses." Further, to marry a wife is written "to take a woman," while to marry a man has a different symbol. (Douglas, *Society in China*, 202.) In this connection note that the imperial editors, writing on the *She-King*, Part I., Bk. i. Ode 2, speak of a strict taboo on the relation of husband and wife in antiquity. "Anciently the rules to be observed between husband and wife required the greatest circumspection. They did not speak directly to each other, but employed internuncios, thus showing how strictly reserved should be intercourse between men and women, and preventing all disrespectful familiarity." (Legge, *The She-King*, Part I., Bk. i. Ode 2, p. 7, note.)

[2] Bk. iv. Ode 7, Stanza 3, note.

[3] "How do we proceed in taking a wife?
Announcement must first be made to our parents.
Since such announcement was made,
Why do you still indulge her desires? . . .
How do we proceed in taking a wife?
Without a go-between it cannot be done.
She-King, Bk. viii. Ode 6, Sts. 3, 4.

[4] Fornication is punished with eighty blows, and the pander is liable to seventy. (Alabaster, *Notes and Commentaries on Chinese Criminal Law*, p. 367.)

[5] Writing of the *She-King*, Dr. Legge says: "The institution of the harem is very prominent, and there the wife appears lovely on her entering into it, reigning in it with entire devotion to her husband's happiness, free

The Chinese husband is master in his own household, the *patria potestas* is strongly developed, and the State interferes inside the family only in extreme cases.[1] The husband may kill his wife if taken in adultery;[2] he may strike her without wounding her,[3] whereas she receives a hundred blows for striking him;[4] while if, for abuse of his parents, he so punishes her as to cause her death, he receives a hundred blows. He may sell his wife,[5] and sometimes does so in times of famine, he may divorce her for barrenness, lasciviousness, disregard of his parents, talkativeness, thievish propensities, envious and suspicious temper, and inveterate infirmity. She, on the other hand, has no power of divorcing him,[6] but at best may arrange to part by mutual consent.[7]

The power of the husband does not end with the dissolution of marriage; if he makes formal complaint of the commission

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from all jealousy of the inferior inmates, in the most friendly spirit promoting their comfort and setting them an example of frugality and industry. It is apparently to these inferior inmates that the concluding verse of an Ode expressing the affectionate devotion of a wife, alludes:

"When your arrows and line have found them,
I will dress them fitly for you . . .
When I know those whose acquaintance you wish,
I will give them of the ornaments of my girdle.
When I know those with whom you are cordial,
I will send to them of the ornaments of my girdle.
When I know those whom you love,
I will repay their friendship from the ornaments of my girdle.'
She-King, Part I., Bk. vii. Ode 8.

[1] Douglas, 78. A father who kills his son without cause is subject to a light penalty. If he kills him for striking or abusing his parents, he goes free. (Alabaster, 156.) The father may require the courts to order the transportation of an unruly son (*ib.*, 154), and a child may be sold for good cause. (*Ib.*, 157.)

[2] But it must be done on the spot. Otherwise he is liable to a mitigated penalty. (Alabaster, 187, 188.)

[3] But he must exercise judgment in correcting her. "If he knocks her brains out when told by his mother-in-law to give her a whipping, he will be responsible for the murder." (*Ib.*, 189.)

[4] Douglas, 81. If the husband kills her for striking him or his parents, extenuating circumstances are allowed. For killing the wife without cause, the penalty is strangulation subject to revision. (Alabaster, 186.) For killing the husband it is decapitation, a severer punishment because it affects the after-life. (*Ib.*, 192.)

[5] By practice, not, unless in exceptional circumstances, by strict law. If she commits suicide in consequence, he is liable to three years' transportation. (Alabaster, 189.)

[6] Unless it is for impotence. (*Ib.*, 182.)

[7] Douglas, 71.

of bigamy by his wife, she is strangled. After the husband's death the widow still owes him a duty. There is no definite institution of suttee, but contemporary authorities tell us that the suicide of widows is frequent, and in the south often public, and turning back to the classical books, we find the widow professing life-long chastity and devotion to the memory of the departed.[1] Hence it is intelligible that women frequently prefer a nunnery or suicide to marriage. And yet the love of home and yearning for absent wife and child is, we are told, no infrequent theme of Chinese poetry. Such is the power of human feeling to survive all laws and institutions.

The position of Chinese women has not undergone any fundamental change within the historical period. Perhaps in some respects it has deteriorated.[2] In particular the binding

[1] "It floats about, that boat of cypress wood,
There in the middle of the Ho,
With his two tufts of hair falling over his forehead,
He was my mate,
And I swear that till death I will have no other.
O mother, O Heaven,
Why will you not understand me?

It floats about, that boat of cypress wood,
There by the side of the Ho,
With his two tufts of hair falling over his forehead,
He was my only one,
And I swear that till death I will not do the evil thing.
O mother, O Heaven,
Why will you not understand me?"

She-King, Part I., Bk. iv. Ode 1.

Cf. Douglas, 216, etc. The sacrifice of wives at the death of the emperor was abolished by Kanghksi 1661–1721. (Douglas, 227.) Human sacrifice at funerals (chiefly of women) appears intermittently from the first recorded case (that of Wu, ruler of Tsin, B.C. 677, when sixty-six people were sacrificed) to the present time. It was opposed by the Confucians. In the eighteenth century suttee was on the increase, and to check it the honours conferred on the suttee women revoked, A.D. 1729. (De Groot, *Religious Systems of China*, ii. 721–807.) De Groot considers it incredible that the case of Wu should really have been the first. Possibly he was the first of his house to be so "honoured."

[2] The *She-King* describes the difference of attitude to the infant son and daughter in terms which are exactly reproduced to-day:

"Sons shall be born to him;
They will be put to sleep on couches;
They will be clothed in robes;
They will have sceptres to play with;
Their cry will be loud.
They will be (hereafter) resplendent with red knee-covers,
The (future) king, the princes of the land.

of feet has grown up within the last thousand years, a mushroom growth in the antiquity of China.[1] The great teachers, though personally married to one wife, and having no concubines, did nothing for the amelioration of the position of women. Mencius, indeed, proposed to divorce his wife because he found her in a squatting position on the floor of her room, and was only restrained by his mother's advice from doing so. This same mother expressed the whole duty of Chinese women when she refused to be consulted as to where they should live. She said, "It does not belong to a woman to determine anything of herself, but she is subject to the rule of the three obediences; when young she has to obey her parents, when married her husband, and when a widow her son."

It only remains to add that where men keep women in so much subjection they generally impute to them a double dose of original sin, and the *She-King*, chiming in with the literature of the Hebrews and Hindoos, says, "Disorder does not come down from heaven, it is produced by the woman. Those from whom come no lessons, no instruction, are women and eunuchs."[2]

5. The Hebrew marriage law begins when we first come across it in the fully-developed patriarchal stage. The analogy of primitive Arabian tribes suggests an earlier state of mother-right, but of this there are in the Old Testament only the merest traces.[3]

Daughters shall be born to him;
They will be put to sleep on the ground;
They will be clothed with wrappers;
They will have tiles to play with.
It will be theirs neither to do wrong nor to do good.
Only about the spirits and the food will they have to think,
And to cause no sorrow to their parents."

She-King, Part II., Bk. iv. Ode 5, Sts. 8, 9.

In point of fact the lot of the infant daughter was often much worse. The extent of infanticide in China has undoubtedly been exaggerated. The killing even of illegitimate children after, though not at birth, is an offence, though but lightly punished. (Alabaster, 170.) The practice, however, is frequent in many districts, and it is the daughter who is ordinarily the sufferer.

[1] Yet there is an objection to the bamboo as a penalty for women, and if subjected to it, they are not stripped as they were in England to the beginning of the nineteenth century. (Alabaster, *op. cit.*, 107.)

[2] *She-King*, Part III., Bk. iii. Ode 10, St. 3.

[3] It is clear that Sara was really Abraham's half-sister, and his marriage to his father's daughter would be in accordance with primitive custom under mother-right.

A man acquires a wife by purchase or by service, from her father or her nearest male relative.[1] In either case she passes completely out of her father's family, and belongs to him who has paid for her. "Is there yet any portion or inheritance for us in our father's house?" say Leah and Rachel. "Are we not counted of him strangers? for he hath sold us and hath also quite devoured the price paid for us."[2]

This very neat summary of the theory of marriage by service has already been referred to. But the marriage affairs of Jacob illustrate some further points which we can understand well from the Babylonian code. Part of the agreement between him and Laban is that he shall not "afflict" Laban's daughters, and that he shall not "take wives beside my daughters."[3] This is quite in the spirit of a Babylonish marriage contract. But there is a further point of similarity. Though Jacob took no more wives, each of his two wives gave him a handmaid precisely as is contemplated in the Code of Hammurabi, and the handmaid's children were in each case reckoned to the wife. In Hammurabi's language, "the wife had granted him the children."

Polygamy is contemplated in the Law, the only limitation being that in the Priestly Code two sisters are not to be married at the same time. Concubinage is also contemplated, and so is the sale of a daughter for that purpose. The daughter that is sold is especially protected in the Book of the Covenant. She is not to be set free in the Sabbatical year, but if she "please not her master who hath espoused her to himself, then shall he let her be redeemed; to sell her unto a strange people he shall have no power." If a girl were espoused to his son she should be dealt with "after the manner of daughters," or if married to her master she was protected in case he took another wife. "Her food, her raiment and her duty in marriage shall he not diminish." In the humane code of Deuteronomy protection is even extended to the captive bondwoman. She is to be allowed a full month for mourning before being married, and once married, "if thou have no delight in her then thou shalt let her go whither she will, but thou shalt not sell her at all for

[1] Laban apparently gives away Rebecca, his sister, and both he and her mother receive precious things for her. At the same time Rebecca's own wishes clearly are considered.

[2] Gen. xxxi. 14.

[3] Gen. xxxi. 50.

money, thou shalt not deal with her as a chattel because thou hast humbled her."

While there is no prohibition of polygamy in the Law—Deuteronomy merely states that the children of the better-loved wife are not to be preferred to the first-born—in practice, as among the Egyptians, the custom seems to have died out little by little,[1] and in the Proverbs monogamy seems to be assumed throughout. The right of divorce rested entirely with the man, and the grounds of it in Deuteronomy are very vaguely expressed. "If she find no favour in his eyes because he hath found some unseemly thing in her, he shall write her a bill of divorcement." But none of the codes are at pains to define the grounds of divorce clearly. They assume it as a right of the husband, and their careless expressions have given grounds for much difference of interpretation which has affected Christian as well as Jewish Law.[2]

There is no mention in the Law of divorce by the wife, but among the later Jews she could claim a divorce if her husband

[1] Apparently it was not formally forbidden till the tenth century, A.D. (Bryce, *Studies*, ii. p. 384.)

[2] Of the Jewish Legalists the school of Shammai (first century, B.C.) pressing the word "nakedness," which is the most literal rendering of the term translated "unseemly," understood it of unchastity; the school of Hillel, pressing (in Rabbinical fashion) the word "thing," and the clause, "if she find no favour in his eyes" (though this, as a matter of fact, is qualified by the following words, "because he hath found some unseemly thing in her"), supposed the most trivial causes to be included, declaring, for instance, that a wife might be divorced, even if she burnt her husband's food, or if he saw a woman who pleased him better. It may be doubted, however, how far the latter opinion was literally acted upon. The grounds mentioned in the Mishnah as justifying divorce are, violation of the law of Moses, or of the Jewish customs, the former being said to consist in a woman's causing her husband to eat food on which tithe has not been paid; in causing him to offend against the law of Lev. xviii. 19; in not setting apart the first of the dough, Num. xv. 20 ff., and in failing to perform any vow which she has made; and the latter in appearing in public with dishevelled hair, spinning (and exposing her arms) in the streets, and conversing indiscriminately with men, to which others added, speaking disrespectfully of her husband's parents in his presence, or brawling in his house. The Karaite Jews limited the grounds of divorce more exclusively to offences against modesty or good taste, a change of religion, serious bodily defects, and repulsive complaints. That the Hebrew word denotes something short of actual unchastity, may be inferred from the fact that for this a different penalty is enacted, viz. death, also the same expression is used, not of what is immoral, but only of what is unbecoming. It is most natural to understand it of immodest or indecent behaviour. (Summarized from Driver, *Deuteronomy*, p. 270, note.)

were a leper or afflicted by a polypus or engaged in a repulsive trade.[1]

The position of the woman in the family gives her guardian certain definite rights and duties as to the disposal of her person. Thus Judah, as the head of the family, proposes to burn Tamar, his daughter-in-law, for unchastity, but acknowledges in time that he was bound to give her as a widow of his son Onan to his other son Shelah. The husband's brother, in fact, had the duty of marrying the widow, and, failing the brother, the obligation fell on the kindred. Boaz, as Ruth's kinsman, first offers her to a nearer relative, and on his refusal weds her himself. The daughter does not inherit landed property if there are sons, but failing sons, she becomes the heir, and in that case she must marry within the tribe, a recognition of the eminent ownership of the tribe over the whole land.

Such being the position of women, it is not to be expected that the attitude expressed to them in literature should be one of great respect or admiration. At best their virtues as housewives were admitted, but in the famous description of the virtuous housewife in the Proverbs there is not a word of a union of mind or soul, and there is little indeed to differentiate the wife from the cheerful, active, intelligent, and let us add, charitable housekeeper. We read that "she spreadeth out her hands to the poor," and again, "she openeth her mouth with wisdom and the law of kindness is on her tongue," but there is no word of the romance of love or of the higher side of the conjugal relation.[2]

On the other side of the account woman is regarded as the source of evil. "Give me any wickedness save the wickedness of a woman" is the burden of Ecclesiasticus. A bad woman is the temptress and the destroyer throughout the Wisdom literature, and it was through woman that sin came into the world, and for this reason, that she was to be subject to her husband.[3]

[1] Driver, p. 271.

[2] It is probably another writer in the Book of Proverbs who says that "a virtuous woman is a crown to her husband." (Prov. xii. 4.)

[3] Mr. Montefiore points out that the appreciation of a good woman is higher in the "Wisdom of the Son of Sirach" than in the Proverbs, in correspondence with the general advance in her position. (*Hibbert Lectures*, 1892, p. 491.)

6. We have seen that among the primitive Arabs mother-right and polyandrous unions prevailed, but in Mohammed's time the women were mere chattels, forming a part of the estate of their husband or father and descending to the son. They were held in low account, and female infants were frequently put to death. "Women are the whips of Satan" is an amiable saying of the masculine Arab of this period, having said which it is not surprising that he should add: "A man can bear anything but the mention of his wives." Mohammed set himself to ameliorate the position of women. "Ye men," he said, "ye have rights over your wives, and your wives have rights over you." But he was not able to carry his reforms very far according to our ideas. He limited the number of legitimate wives to four, but allowed an unlimited number of slave concubines; he insisted that the woman's consent to her marriage should be obtained, but the consent of her guardian also remained essential. Whether the temporary marriage in practice in Mohammed's time is still allowed is debated between the sects.[1]

But free divorce Mohammed was compelled to tolerate: "The thing which is lawful but is disliked by God is divorce." There are, indeed, certain cases in which divorce is compulsory,[2] but even apart from them the husband may divorce his wife without assigning any cause. The wife, however, is protected by the dower, or more strictly, the bride price, of which a portion is deferred, and which may be claimed by the wife if she is divorced without cause.[3] Her position is therefore somewhat similar to that which the provident Babylonian or Egyptian woman secured for herself by the marriage contract. On her side, the wife is bound to live with her husband, but if she can prove ill-treatment, can obtain a separation from the Kadi. Bad conduct or gross neglect is a good defence to a suit brought by the husband for the restitution of conjugal rights.[4] The husband has, however, the right of chastisement, and the admonition of the prophet, "Not one of you must whip his wife like whipping a slave," does not, to European ears, appear to err on the side of chivalry.[5]

[1] Hughes, *Dictionary of Islam*, p. 314.
[2] Hughes, pp. 87, 88.
[3] *Ib.*, 91.
[4] *Ib.*, 673.
[5] The traditions record that the prophet forbade the Moslems to beat their wives. Brute force being thus ruled out, natural superiority asserts

Yet Mohammed made the kind and equitable treatment of wives a moral if not a legal duty: "The best of you is he who behaves best to his wives." The lord of many women must be impartial. "When a man has two wives and does not treat them equally he will come on the day of resurrection with half of his body fallen off." But if there is to be kindness, it is to be such as is due to the weaker vessel: "Admonish your wives with kindness, because women were created from the crooked bone of the side."[1]

The position of the wife under the Sunni law is thus summed up by Mr. Hughes:—

"Her consent to marriage is necessary. She cannot legally object to be one of four wives. Nor can she object to an unlimited number of handmaids. She is entitled to a marriage settlement or dower, which must be paid to her in case of divorce or separation. She may, however, remit either whole or part of the dower. She may refuse to join her husband until the dower is paid. She may be at any time, with or without cause, divorced by her husband. She may seek or claim divorce (khul') from her husband with her husband's consent. She may be chastised by her husband. She cannot give evidence in a court of law against her husband. According to the Sunnis, her evidence in favour of her husband is not admissible, but the Shi'ahs maintain the opposite view. Her husband can demand her seclusion from public. If she becomes a widow she must observe hidād or mourning for the space of four months and ten days. In the event of her husband's death she is entitled to a portion of her husband's estate in addition to her claim of dower, the claim of dower taking precedence of all other claims on the estate."[2]

Nor has a woman full legal privileges outside marriage. Her

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itself, and the faithful come to complain that the women have got the upper hand. The prophet consequently revokes the order, and then the women complain in their turn. Mohammed is then reduced to moral suasion: "Those men who beat their wives do not behave well. He is not of my way, who teaches a woman to go astray and entices a slave from his master." (Hughes, 671.)

[1] A wife taken in adultery might be stoned, but four witnesses with a fivefold repetition of the oath were required to prove the offence. (Koran, Part I., Chap. iv. 15.) Nor is the death-penalty recommended, but rather seclusion in the house. (*Loc. cit.* and Hughes, p. 11.) Fornication is strictly forbidden to men.

[2] Hughes, p. 671.

evidence is not accepted in cases involving retaliation. Her fine is one-half that of a man, and the value of her testimony one-half that of a male witness. Yet she may hold public positions, she may act as a judge except where retaliation is involved, and in some Mohammedan states princesses have ruled. She can hold property, retains the usufruct of her property during marriage, and takes the property with her in case of divorce. She has also a claim to inherit along with her male relations, confirmed by the express words of the prophet.[1] She is not to be slain in war, and for apostasy she is not put to death, but imprisoned until she recants. The general attitude of the Mohammedan world towards her is too well known to need illustration, but two traditional sayings of Mohammed may be quoted as illuminating the intellectual chaos to which a well-meaning man is reduced when he contemplates that helpmate over whom he so complacently assumes superiority and dominion. The first is this, "I have not left any calamity more detrimental to mankind than women," and the second is the complementary expression of the master in his other mood, "The world and all things in it are valuable, but more valuable than all is a virtuous woman."

With this final contradiction mirrored in the double motive for secluding women, (*a*) as a compliment, implying that they are elevated above the ordinary affairs of life; (*b*) as a precaution, implying that they are not to be trusted with liberty—with this contradiction in theory and in practice, rooted as it is in a radically false view of womanhood, we may leave the Oriental world and its efforts to deal with the relations of the sexes.

7. But the first nation of the West to which we turn was in this respect largely orientalized. The Greeks founded Western civilization, but their rapid advance in general culture was by no means accompanied by a corresponding improvement in the position of women. On the contrary, it is in the earliest period and among some of the most backward states that the woman has most freedom.

The Homeric woman moves freely among men. Nausicaa

[1] Koran, i. p. 72; cf. Dareste, pp. 61–63.

welcomes Odysseus and brings him to her father's house. She bids him kneel to her mother if he would gain a welcome and succour from her father.[1] The relation of husband and wife is close and tender; Andromache relates how her father's house has been destroyed with all that were in it, "but now, Hector, thou art my father and gracious mother, thou art my brother, nay, thou art my valiant husband."[2]

We never hear of more than one legitimate wife. On the other hand, the carrying off of women as bond-slaves was habitual. Briseis was a recognized portion of the spoil, and such capture implies concubinage along with legitimate marriage.[3] If the bridegroom could not take the bride in a raid, he bought her for a goodly number of cattle, and over his concubines, at any rate, he exercised powers of life and death. Odysseus compels the faithless handmaidens to carry forth the bodies of the suitors and bids Telemachus put them to the sword; but Telemachus thinks this too good a death, and strings them up to a ship's cable in the hall, where they hang struggling like thrushes in a net.[4]

The *patria potestas* persisted in a mild form in the historical period.[5] The father was the religious and legal head of the family; he performed the family *sacra*, and represented wife, children and slaves in the courts.[6] Nor were limitations on personal liberty and responsibility peculiar to the wife, for here again woman was subject to the three obediences to father, husband or son, and failing them, to her nearest blood relation.

[1] At the same time Arete's position seems to have been somewhat exceptional, for Alcinous honoured her as no other woman in the world is honoured of all that now-a-days keep house under the hand of their lords. (*Od.*, vii., Butcher and Lang Tr., p. 105.)

[2] *Iliad*, vi. 429, 430.

[3] Yet the wife might resent this. Laertes bought Eurycleia in her youth for twenty oxen and honoured her equally with his wife, "but he never lay with her, for he shunned the wrath of his lady." (*Od.*, i., Tr. Butcher and Lang, p. 15.)

[4] *Od.*, xxii. 468.

[5] The right of exposing a child was limited in Sparta by the meeting of the tribesmen. (Plutarch, *Lycurgus*, 16, cited by Leist.) Leist, p. 59, thinks the ἀγχιστεῖς must be meant. At Athens the right disappeared at an early date, and the recognition of the child could be compelled by legal process. (Leist, *ib.*) The adult son was emancipated.

[6] The Athenian woman could follow no suit of a value exceeding a medimnos, except through a guardian. The wife had very limited powers of alienation without the husband's consent.

The sons in most cases divided the inheritance, the daughters having only a right to maintenance and dowry. But what property women had remained theirs during marriage, and in some states they even had the right of management.[1] In early times the father might sell his daughters, or brothers their sisters, when under their guardianship. This right was abolished by Solon except in the case of unchastity,[2] but a father retained the right of controlling his daughter and even of disposing of her by will,[3] or of giving his son, while a minor, in adoption to another family.[4] There could be no legitimate marriage without an assignment of the bride by her guardian.[5] The wife passed into the husband's family, and was separated from her own kin and their *sacra*. At Athens she might be divorced on payment of the bride price, while on her side she could only obtain a divorce by the sanction of the archon.[6] At Sparta, where, in some respects, *e. g.* in regard to property, she had a higher position,[7] it seems that looser relations prevailed. Brothers might share a wife in common, and wife-lending was recognized, whereas at Athens the punishment of adultery was enforced.[8]

1 Busolt, *Handbuch der Klassischen Altertumswissenschaft*, 19, 20.

2 *ἔτι δ' οὔδε θυγατέρας πωλεῖν οὔτ' ἀδελφάς δίδωσι πλὴν ἄν μὴ λάβῃ παρθένον ἀνδρὶ συγγεγενημένην.* (Plut. *Solon*, 13, 23, cited by Busolt, *l. c.*)

3 Letourneau, *La Femme*, 416.

4 Busolt, p. 19. According to Leist, p. 62, he had practical, but not legal control over the son's marriage.

5 At any rate at Athens. (Busolt, 201.) The *ἀγχιστεῖς* (relations to the fourth degree on both sides) had to see that the orphan heiress was married, and her nearest male relation (after her brothers) had the right of marrying her, and correspondingly the duty of so doing or of finding a husband for her. (Busolt, 20 ; Leist, 40, 47.)

6 Letourneau, *La Femme*, 423. At Sparta divorce for sterility seems to have been expected at any rate of a king. (Herodt., v. 40.)

7 According to Aristotle two-fifths of the land of Sparta had come into the hands of women by inheritance and bequest in his time, and the Spartiate women, having successfully resisted the attempt of Lycurgus to impose on them the same discipline as the men accepted, enjoyed a state of liberty which in Aristotle's view amounted to licence, and was disastrous to Sparta. (*Politics*, ii. 1269 B, 1270 A.)

8 By the Solonian legislation the husband who concealed his wife's adultery was punished with *ἀτιμία*. Yet the punishment of the adulterer was left in the husband's hands. If caught *flagrante delicto* he was absolutely at the husband's mercy. In any case he could be imprisoned at the husband's pleasure, and was released on payment of a fine. (Letourneau, p. 422.) The wife was not killed, but divorced. (Leist, p. 300.) For an instance of wife-lending at Athens, Letourneau cites the case of Kimon. (Letourneau, p. 415.)

Monogamy prevailed in the main,[1] but concubinage was legally recognized, provided that the handmaiden did not reside in the same house with the legal wife. The concubine's children might be legitimated by adoption, and might then enter the phratry, whereby they acquired all the privileges of citizenship.[2]

But the woman, though under ward, was certainly not regarded as a chattel. Probably Aristotle expressed the ordinary Greek view accurately enough when he said that a man should rule his slaves as a despot, his children as a king, and his wife as a magistrate in a free state. Yet it was a Greek thinker who first frankly argued the case for the free admission of women to all the duties and rights of man. Plato's position differs from that of his modern successors in that he insists rather on women's duties than on their rights, more on what the state loses by their restriction to the family circle than on the loss to their own personality. Further, though he had the experience of Sparta to go upon, his own teaching was too much associated with polemics against the family and with a fanciful ideal of communism to be taken quite seriously. On the other hand, Aristotle summed up the whole philosophy of the ancient world, of the East, and perhaps the prevailing sentiment in modern Europe, when, discussing those who are fit to bear rule and order the affairs of men, he says that a slave does not possess that power of deliberation (*τὸ βουλευτικόν*) which is the basis alike of self-government and of the government of others. A child possesses it but imperfectly. A woman possesses it, but in her it is without authority (*ἄκυρον*). After all, the Greeks did little to develop it. There appear to have been no regular schools for girls at Athens,[3] and it was only the courtesan of the higher class who was a fit helpmeet mentally for Pericles or capable of sustaining a conversation with Socrates. Xenophon's ideal wife is a good housekeeper, like her of the Proverbs.

8. The modern European marriage law has three roots—Roman Law, Primitive Teutonic custom, and the Christian doctrine of

[1] Anaxandrides, king of Sparta, declined to divorce his barren wife, but consented to take a second. This was regarded as quite un-Spartan. (Herodt., v. 40.)

[2] Busolt, *op. cit.*, p. 201.

[3] Here the Spartans were more liberal, as they admitted women to the gymnasia. (Busolt, ii. 158.)

marriage; but it has been largely re-modelled in the modern period under rationalizing influences. It cannot be studied statically, but has a long, varied and interesting history, of which an attempt will be made here to give the briefest possible outline. This history starts with the early Roman family, organized as it was under the highly-developed *potestas* of the father. All the children are the father's, and in law he can dispose of them at pleasure.[1] He can chastise them, sell them into slavery, and even put them to death (*jus vitæ necisque*).[2] Before exercising this supreme power he has, it is true, to consult the council of relations, but he is not bound by their judgment. In short, the paternal power is nowhere more strongly developed, nor does the position of wife and children anywhere approach in law more nearly to that of slaves, owned by the paterfamilias, and except as a matter of grace, incapable of owning anything themselves.

Into the family thus constituted a wife passed on her marriage. The marriage might be accomplished by either of two forms, and it might also be made valid apparently without any form at all. The first form was *confarreatio*, in which the essential feature was the eating by both bride and bridegroom of a cake—an act of the kind which we call symbolic, but which to primitive man is rather magical, actually efficacious in establishing a unity of the man and woman. The second form was called *coemptio*, and was of the nature of a formal sale, almost certainly, in the light of what we know of other peoples, preserving the memory of a real purchase of the wife by the husband, which as anything but a form had already fallen into disuse when history begins. Both these forms transferred the wife from the power (*potestas*) or hand (*manus*) of her father into that of her husband, to whom

[1] Exposure, however, if the law attributed by Dionysius (ii. 15, Bruns, p. 7) to Romulus is correct, was limited to female infants and required the consent of the neighbours—*ἅπασαν ἄρρενα γενεὰν ἐκτρέφειν, καὶ θυγατέρων τας πρωτογόνους.* No child was to be killed under three years—*πλὴν εἴ τι γένοιτο παιδίον ἀνάπηρον ἢ τέρας εὐθὺς ἀπὸ γονῆς. ταῦτα δ' οὐκ ἐκώλυσεν* ('Ο 'Ρωμύλος) *ἐκτιθέναι τοῦς γειναμένους, ἐπιδείξαντας πρότερον πεντε ἀνδράσι τοῖς ἔγγιστα οἰκοῦσιν,* etc.

[2] Bruns (p. 7), quoting Dion. ii. 26. ('Ο 'Ρωμύλος) *ἅπασαν ἔδωκεν ἐξουσίαν πατρὶ καθ' υἱοῦ, καὶ παρὰ πάντα τὸν τοῦ βίου χρόνον ἐάν τε εἴργειν ἐάν τε μαστιγοῦν, ἐάν τε δέσμιον ἐπι τῶν κατ' ἀγρὸν ἔργων κατέχειν, ἐάν τε ἀποκτιννύναι προαιρῆται,—ἀλλὰ καὶ πωλεῖν ἐφῆκε τὸν υἱὸν τῷ πατρί,—καὶ τοῦτο συνεχώρησε τῷ πατρί, μέχρι τρίτης πράσεως ἀφ' υἱοῦ χρηματίσασθαι.—μετὰ δὲ τὴν τρίτην πρᾶσιν ἀπήλλακτο τοῦ πατρός.*

she became as a daughter. For all purposes, sacred and profane, she passed from the one family to the other.[1] But just as inanimate property, which normally passed from hand to hand by a special ceremony of transfer, might also acquire a new owner by long unchallenged possession and use, so was it also with human property. The woman who without either of the two ceremonies mentioned was given by her father to a man and lived with him as his wife for a whole year without interruption became in law his wife by use (*usus*) and passed as completely *in manum mariti* as if she had eaten with him the sacred cake.

All these three modes of marriage were in existence at the time of the drawing up of the Twelve Tables, and whichever of them she chose, the woman passed into the family and into the power of her husband. Yet her position differed in two essential respects from that of the Oriental wife. She was her husband's only wife. At no period of Roman history are there any traces of polygamy or concubinage.[2] And not only was she the sole wife, but the tie which bound her to her husband was difficult to break and rarely broken. It is true that each form of union could be undone by a certain prescribed ceremony—*confarreatio* by *diffarreatio*, *coemptio* by *remancipatio*. But these were resorted to rarely, and it would appear only for grave offences, the council of relations being first called in to give judgment.[3] It does not appear that the wife had any

[1] Cf. on the religious marriage Dion. γυναῖκα γαμετὴν τὴν κατὰ γάμους ἱεροὺς συνελθοῦσαν ἀνδρὶ κοινωνὸν ἁπάντων εἶναι χρημάτων τε καὶ ἱερῶν (Bruns, p. 6).

[2] The concubinate of which we hear in Roman law is a form of union, bereft of some of the civil rights of marriage, not the relation of a married man to a secondary wife or slave-girl.

[3] Bryce, *Studies in Jurisprudence*, vol. ii. p. 403. The offences for which, according to Dionysius, ii. 25 (Bruns, p. 7), she was brought to trial before a council of relatives were, however, punishable with death. They were adultery and wine-drinking. (ταῦτα—οἱ συγγενεῖς μετὰ τοῦ ἀνδρὸς ἐδίκαζον.) The grounds for divorce stated by Plutarch are poisoning the children, the use of false keys, and adultery. Divorce for any other reason was punished with confiscation of property. The wife could not leave her husband in any case. (γυναικὶ μὴ διδοὺς ἀπολείπειν ἄνδρα, γυναῖκα δὲ διδοῦς ἐκβάλλειν ἐπι φαρμακείᾳ τέκνων ἢ κλειδῶν ὑποβολῇ καὶ μοιχευθεῖσαν εἰ δ' ἄλλως τις ἀποπέμψαιτο, τῆς οὐσίας αὐτοῦ τὸ μὲν τῆς γυναικὸς εἶναι, τὸ δὲ τῆς Δημήτρος ἱερὸν κελεύων. Bruns, p. 6. Cf. Girard, p. 154.) Divorce by the husband was recognized in the Twelve Tables. The husband takes the wife's keys away and turns her out of the house. "Illam suam suas res sibi habere jussit, ex XII tabulis, claves ademit, exegit." (Cic. Phil. ii. 28. Bruns, p. 22.)

means of repudiating the husband, or of emancipating herself from his *manus*. In practice marriage was so nearly indissoluble that the divorce of his wife by Spurius Carvilius Ruga in B.C. 231 was declared to be the first instance[1] known since the foundation of the city. On the other hand, it must be remembered that the unfaithful wife might be put to death without trial, and that the husband who had other good causes of complaint would be supported by the family council in executing or in repudiating her.[2]

9. Such was the primitive Roman marriage with the *manus*. But even in the days of the Twelve Tables a wholly different union had made its appearance. If the enjoyment of property was broken for awhile before the year was out, no title to it arose out of the usufruct. This idea was applied to marriage by *usus*, and already in the time of the Twelve Tables we find that if the cohabitation was broken for three nights in every year, the wife did not become the property of the husband. When or how it became a custom to convert this breach of cohabitation into a system, and so establish a form of marriage in which the wife did not pass into the *manus* of the husband, we do not know. What is certain is that this new form of free marriage rapidly ousted its older rivals. The bride now remained in her father's power, she was still a member of her own family, and by consequence had no position in that of her husband. Subject to the nominal control of her father or her guardian, she thus acquired complete control of her own property, and became, in fact, her own mistress. She was not in theory a free woman unless emancipated. She was only free from her husband. But it need hardly be pointed out that the practical control of relations with whom as a married woman she no longer lived was not likely to be a very serious matter, and in point of fact, where it was felt to be irksome, it was from time

[1] Ruga's wife was divorced for sterility, and Mr. Bryce takes the sweeping statement of the authorities to mean that it was the first instance of a divorce in which no crime was alleged (ii. 403).

[2] At the same time, if Plutarch (Rom. 22) is to be trusted, it was a religious offence to sell her as a slave (*τὸν δ' ἀποδόμενον γυναῖκα θύεσθαι χθονίοις θεοῖς* (Bruns, 7). In this point she enjoyed a material advantage over the children.

to time limited by law. Thus the father had naturally as a part of his *potestàs* the right to break the marriage at will. But this logical application of the paternal power was abolished under the Antonines, or restricted to cases where there was grave cause for its exercise.[1]

On the other hand, the *tutela* was a reality for unmarried women, and the Roman law never seems to have fully acknowledged that the consent of the adult woman, and her consent alone, was the one necessary condition to her marriage. Originally, indeed, the consent of the parties does not seem to have been required at all. This would be all in accordance with primitive ideas. But here again the law was modified as time went on, and the consent of the woman, as well as the man, became a normal, and, in some cases, a legally necessary condition.[2] Further, with the general emancipation of women the necessity for a guardian appears to have gradually died away.[3] Hence the Roman matron of the Empire was more fully her own mistress than the married woman of any earlier civilization, with the possible exception of a certain period of Egyptian history, and it must be added, than the wife of any later

[1] The separation of a wife from her husband by her father was forbidden by Antoninus Pius, but was permitted "magna et justa causa interveniente" by his successor. (Sir F. Jeune, *Encl. Brit.*, art. "Divorce," p. 471; Girard, p. 155.) The son also acquired the right to emancipation in case of ill-treatment. (Girard, 183.)

[2] The consent of the parties was of course required if they were *sui juris*. On the other hand, by the strict logic of the law, if either was in tutela, and this would be the normal case with a girl (and even with a grown-up woman), the affair would have been one for the guardians alone. Thus Ulpian, v. 2, says, "Consentiant si sui juris sunt, aut etiam parentes eorum si in potestate sunt." (Cited by Girard, p. 147, note.) The *Lex Julia*, A.U.C. 736, gave an appeal from the guardians, if they refused consent, to a court. Further, the best jurists, including Ulpian himself, held the consent of the parties to be necessary as well as that of their guardians. "Nuptiae consistere non possunt nisi consentiant omnes; id est qui coeunt, quorumque in potestate sunt." (*Digest*, XXIII., ii. 2.) With this, however, we must read—"Sed quae patris voluntati non repugnat consentire intelligitur. Tunc autem solum dissentiendi a patre licentia filiae conceditur si indignum moribus vel turpem sponsum ei pater eligat." (*Just. Digest*, xxiii. i. 12. Cited in Viollet, *Droit Civil Français*, p. 404.)

[3] Originally all women were in tutelage. "Veteres voluerunt feminas, etiamsi perfectae actatis sint—in tutela esse—exceptis virginibus vestalibus, quas . . . . liberas esse voluerunt; itaque etiam lege XII Tabularum cautum est." (Gaius, i. 144, 145, in Bruns, 21.) On the extinction of the *tutela*, see Girard, pp. 196 and 213.

civilization down to our own generation. Practically independent of her father, she was legally independent of her husband. She could bring an action against others and with some limitations against him.[1] She could hold property and dispose of it freely.[2] On the other hand, being separated from his family, she does not succeed to his property if he dies intestate, nor do her children succeed to her, nor she to them. So much followed from the strict theory of marriage without the *manus*, though here, as elsewhere, natural feeling had its way, and practical rules were introduced by the Prætorian legislation to prevent consequences which would seem harsh to the temper of the time.

These changes naturally affected the stability of marriage. We have seen that under the old law divorce was rare and difficult, but the revolution effected in marriage by the disappearance of the *manus* was nowhere more conspicuous than in its effect upon the permanence of the marriage tie. By the newer form of marriage neither did the wife pass into the husband's family nor the husband into the wife's family. They remained distinct persons, distinct individualities, and as they freely entered into the marriage relation, so could they freely leave it. Divorce, in short, as in so many primitive tribes, stood freely at the choice of either party. In the best time of the Republic divorce without adequate cause incurred penalties, a pecuniary fine, or, still more serious, the *nota censoria*. But with the growth of the new form of marriage opinion rapidly changed, and, as Mr. Bryce points out, we find at the close of the Republic not only Pompey, but "such austere moralists as Cato the Younger and the philosophic Cicero" putting away their wives. The reader of Cicero's letters who is unacquainted with the Roman law of divorce will perhaps remember the

[1] In case of adultery the husband could originally kill the wife. The *Lex Julia* compelled him to prosecute, the punishment being *relegatio*. The same law punished fornication with women of rank. (Girard, *Manuel elémentaire du Droit Romain*, 160, 176.)

[2] Girard, p. 159. The dos or dowry brought by the wife from her own family's resources to the maintenance of the joint life passed originally to the husband; but while he continued to administer it, his right over it became more and more restricted in favour of the wife, so that the jurists (*e. g.* Ulpian) speak of it as being her property, and this is recognized by Justinian, who gives her a right to reclaim it on the dissolution of the marriage from whatever cause. (Girard, pp. 922–926.)

shock of surprise with which, after becoming well acquainted with Terentia from many allusions he suddenly finds Cicero calmly referring to his divorce and re-marriage. At this period divorce had, in fact, become as commonplace an incident of life as marriage itself.

How far the freedom of women had the demoralizing results which have been generally attributed to it by those whose business it has been to paint the Roman Empire in the darkest colours, is a matter on which the best authorities do not speak with confidence. It must be remembered that our accounts of Roman social life are drawn in part from satirists like Juvenal, or satirical historians like Tacitus, and that we should be as far astray in taking their description as an impartial account of the society in which they lived as we should be if we accepted the picture of our own social life as it could be painted for us by some preacher of reform, or some contemporary censor of morals. The satirist has a great function in the world, but it is not that of supplying the historian of manners with material ready for use without analysis. Other sources are the writings of Christian fathers, who from a different point of view were even more prone to denounce the wickedness of the world as they found it.

The very fact that the Romans took so serious a view of feminine profligacy militates against the belief that the corruption had gone quite so deep as is generally supposed. Lucius Piso declared that modesty had vanished since the censorship of Messalla and Cassius in B.C. 154.[1] Yet we have the testimony of Velleius that in the proscriptions of the Second Triumvirate, while the sons were never faithful and freed-men only sometimes so, the wives could be trusted always. The freedom of divorce was abused, as it is in the present day in America. According to Seneca there were women who reckoned the years not by the consuls, but by their husbands, but this again is obviously satire. On the other hand, there are instances of three, four, or five wives, and, again, of three to five husbands. A marriage of forty-one years is recorded as unusually long, and in this case the wife had urged divorce and re-marriage upon her husband

[1] Friedländer, *Sittengeschichte Roms.*, i. 475. Friedländer's whole discussion, pp. 475–507, is instructive, if somewhat indecisive. The judgment of Professor Dill, whose work has appeared since the above was written, is more clearly favourable. (*Roman Society*, pp. 77, 79, 145, etc.)

after the death of their daughter, for the sake of getting children. This, however, is remote in sentiment from anything like profligacy, and connects itself rather with the primitive idea of the necessity of children. The literature of the time has stories of faithful wives as well as of profligate women to record—stories of wives accompanying their husbands in suicide, dying with them in proscriptions, or going with them into exile. Every one knows of Arria, who thrust the dagger first into her own bosom, and then offered it to her husband, with the words, "Paete, non dolet." But we do not all know that she became a kind of heroine of the time, and upon a gravestone in Anagnia is addressed along with Laodamia by a woman who asks her to receive her soul.[1]

The evidence of the tombstones, which in all ages bear a singular family resemblance, shows that the domestic ideal held sway under the free manners of imperial Rome, as under the masculine despotism of the East or the sentimentality of the West. A panegyric on Murdia in the second half of the first century says all gravestones of women must be alike, "because their virtues admit of no heterogeneity, and it is enough that all have shown themselves worthy of the same good report." "All the greater renown has my dearest mother won, who has equalled and in no way fallen behind other women in modesty, rectitude, chastity, obedience, household work, carefulness and loyalty." Another inscription says, "She was of pleasant address and noble gait, took care of her house and span." In another, the husband has sworn not to take another wife. Another, "I await my husband"; another, "Never have I experienced a pain from thee, except through thy death."

Upon the whole the Roman Matron would have seemed to have retained the position of her husband's companion, counsellor and friend, which she had held in those more austere times when marriage brought her legally under his dominion.

10. To understand how Roman marriage became modified in the Middle Ages we must retrace our steps and hark back to the two other influences mentioned at the outset. The first of these need not detain us long, for the primitive law of the Germanic

[1] Friedländer, i. 514.

tribes which overran the Roman Empire closely resembled the early law of the Romans themselves. The power of the husband was strongly developed; he might expose the infant children, chastise his wife, dispose of her person. He could not put her to death, but if she was unfaithful, he was, with the consent of the relations, judge and executioner.[1] The wife was acquired by purchase from her own relatives without reference to her own desires,[2] and by purchase passed out of her family. She did not inherit in early times at all, though at a later period she acquired that right in the absence of male heirs. She was in perpetual ward, subject, in short, to the Chinese rule of the three obediences, to which must be added, as feudal powers developed, the rule of the king or other feudal superior.[3] And the guardianship or *mundium* was frankly regarded in early law rather as a source of profit to the guardian than as a means of defence to the ward, and for this reason it fetched a price in the market, and was, in fact, saleable far down in the Middle Ages. Lastly, the German wife, though respected, had not the certainty enjoyed by the early Roman Matron of reigning alone in the household. It is true that polygamy was rare in the early German tribes, but this, as we have seen, is universally the case where the numbers of the sexes are equal. Polygamy was allowed, and was practised by the chiefs.

This primitive marriage system came into contact not only with the Roman Law, but with the still more powerful influence of the Church. The Church regarded marriage as a concession to the weakness of the flesh. It is not a sin, and those who denounce it as such are severely reprobated. Nevertheless it is of the nature of a hindrance in spiritual duties. It is incom-

[1] Conversely the adultery of a man is no offence against his own wife, but only against another husband. The proprietary view appears strongly in the old English law. "If a freeman lie with a freeman's wife let him pay for it with his wergild, and provide another wife with his own money" *i.e.* to replace his mistress who has been slain by her husband. (Howard, *Matrimonial Institutions*, ii. 35.)

[2] Whether it was the woman or the guardianship over her which was technically sold is a fine legal point, on which a host of authorities may be seen arrayed on both sides in Howard, i. 260, 261. The only ethical points in question are (1) whether her consent was necessary; (2) what rights she enjoyed when sold.

[3] Waitz, *Verfassungsgeschichte*, i. 57–60.

patible with the performance of the Sacraments, and thus continence is enjoined on priests. It was indeed only after a long struggle that the celibacy of the priesthood was established as a law of the Roman Church. Such a prohibition was mooted at the Council of Nice, but not carried, while by the rejection of the proposal at the Sixth Council the Eastern Church escaped from this burden altogether. Nor was it till the time of Hildebrand that it became the definitive rule in the West. With regard to the laity, the chief concern of the Church was to save souls by preventing the deadly sin of fornication. Hence came several results; on the one hand, the form of marriage was reduced to its simplest possible terms. The mere statement of each party that they took one another as spouses was deemed sufficient, providing that the mutual pledge referred to the present (*per verba de præsenti*).[1] Even witnesses were not necessary, though, of course, they were in practice required in order to prove that the pledge had been made. It was the duty of the parties to have a wedding ceremony in church, in fact, it became a breach of law and morals to marry by any other form, but the omission of such a ceremony did not affect the validity of the marriage.[2]

In close connection with this law as to the form of marriage is the position to which the Church was gradually led, and which it finally maintained with great firmness, that the consent of the parties alone is the only thing necessary to constitute a valid marriage. Here the Church had not only to combat old tradition and the authority of the parents, but also the seignorial power of the feudal lord, and it must be accounted to it for righteousness that it emancipated the woman of the servile as well as of the free classes in relation to the most important event of her life.[3]

[1] At least from the time of Alexander III. The controversies as to the exact conditions of a valid marriage (*e. g.* as to whether consummation was required, as Gratian maintains, to complete the marriage) need not trouble us here. (Howard, *op. cit.*, i. 336, 337. *Decret. Grat.*, 1062, seq.)

[2] For the stages by which the ecclesiastical ceremony grew up, and was made legally obligatory, see Howard, i. chap. 7. Lay marriage and clandestine marriage, though illegal, remained valid down to the Council of Trent in Catholic countries. In England, except for the period of the Commonwealth, they were valid down to the passing of Lord Hardwicke's Act in 1753. (Howard, i. 351 and 446, etc.) For the scandalous Fleet marriages which made the Act necessary, see *ib.*, 437, seq.

[3] The early fathers held by the consent of the parents, and Ambrose

A third consequence was that the marriage, once concluded, was indissoluble; it was deadly sin for one man to have to do with more than one woman, or for one woman with more than one man. That being so, divorce in the full sense became at once an immorality; there might be separation for grave cause, but even that is jealously restricted as giving occasion for sin. There might also be annulment of marriage, which is simply a recognition that what purported and was supposed to be a marriage, never was a lawful union at all, but there could be no putting asunder of those whom God had once joined together.[1]

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apparently thinks that the whole matter should be left to them. He quotes with approval Euripides:

νυμφευμάτων μὲν τῶν ἐμῶν πατὴρ ἐμός
μέριμναν ἕξει, κ'οὐκ ἐμὸν κρίνειν τάδε

and says, "ergo quod et ipsi philosophi mirati sunt servate virgines." (*Decretum Gratiani*, *Corpus Juris Canonici*, 1124.)

In Gratian it is admitted that the "paternus consensus desideratur in nuptiis, nec sine eo legitimae nuptiae habeantur," and he quotes "illud Evaristi Papae: Aliter non fit legitimum conjugium, nisi a parentibus traditur" (p. 1123.) But the consent of the parents was incompatible with the self-marriage of the parties, which the Church held necessary for the avoidance of fornication. Accordingly Gratian's own view is that consent makes marriage (pp. 1062, etc.), though he has difficulty in reconciling this with the further condition that consummation should have taken place. With these difficulties we are not concerned here. The question of parental assent was decided by Innocent III., who declared it unnecessary. (Viollet, p. 406. See Howard, vol. i. p. 336, etc.) The Decretals of Gregory IX. are perfectly clear, "Matrimonium solo consensu contrahitur." (*Corpus Juris*, p. 660.)

The Council of Trent, while compelled by the abuses of private marriages to declare marriage void if not performed by a priest, anathematizes those who maintain that marriage without the consent of the parents is invalid. (Acts of Council of Trent in *Corpus Juris*, p. 71.) It is, of course, not implied that the father has no right of veto, but only that the marriage once consummated is indissoluble. But further, the daughter who disobeyed her father's order to marry was protected by the Church. She was declared free of the sin of ingratitude, and is therefore not to be disinherited. (Owen, *Institutes of Canon Law*, p. 133.)

[1] This was the final view of the Church, reached by slow degrees. The deliverances of the New Testament being uncertain, the views of the early fathers waver, but nearly all agree that divorce is forbidden except for "fornication." This term is, however, sometimes given a wider spiritual sense so as to include idolatry and even covetousness. But Augustine (who had at first admitted the wider view) came to regard adultery as the only cause of separation, refused to allow any difference between man and woman, and allowed no dissolution of the nuptial bond even for adultery. This view was accepted by the Council of Carthage in 407. In its final form the canon law allowed separation for (1) adultery, the wife having an equal right of action with the husband; (2) "spiritual" adultery, which

Lastly, the moral consequences of any violation of the marriage law were held by the Church to affect the man no less than the woman. And though the Church never succeeded in converting the world to this view, it must be noted here as a departure hardly, if ever, paralleled in the history of ethical thought before the rise of the spiritual religions.[1]

The whole domain of marriage was in the end conquered by the Church, but the victory was only gradual. Polygamy remained among the Franks in the days of Chilperic and Dagobert, the latter of whom had three queens, and in some districts of France, such as Bigorre, concubinage lasted up to the fifteenth century. But monogamy speedily became the rule everywhere.[2] In the matter of the bride's freedom the struggle was more prolonged, and two voices were sometimes heard within the Church itself, but from the ninth century onwards the consent of both parties was at least supposed, and by the decision of Innocent III. the consent of the father ceased to be even a necessary condition. The feudal power of disposing of widows and orphans was also slowly worn away. In 614 we find it repudiated by Clothaire II., yet it survived, and in 1232 we find the Emperor resigning his right in this direction at Frankfort.[3] Generally speaking, the families of serfs required authorization to marry, and in England no mark of servile tenure was more resented than the payment of the merchet, or fine on marriage, which implied that the right of marrying was at the lord's discretion.[4] In 1408

came to mean apostacy, and perhaps compulsion of one party by the other to commit crime; (3) cruelty. (Howard, ii. p. 53.)

[1] Gratian quotes Ambrose, who is very precise: "Omne stuprum adulterium est, nec viro licet quod mulieri non licet. Eadem a viro quae ab uxore debetur castimonia." (*Corpus Juris*, 1128.)

[2] Viollet, p. 388.

[3] Viollet, p. 410. As to the authority of feudal superiors, the Council of Trent finds that in the sixteenth century it is still common for secular lords to compel men and women in their jurisdiction to marry against their will, and denounces the practice *sub anathematis poena* "quum maxime nefarium sit matrimonii libertatem violare." (Council of Trent, p. 74.) From an early period the Church had given sacramental sanction to the concubinate, *i. e.* marriages of the unfree, or between unfree and free. (Howard, i. p. 276.) On the other hand, the sacramental view enables the Church to justify the dismissal of a mistress for a wife of free status, "Ancillam a toro abjicere et uxorem certae ingenuitatis accipere non duplicatio conjugii sed profectus est honestatis." (Pope Leo in *Decr. Grat.*, p. 1123.) This was to invest the most callous and heartless form of wickedness with an air of piety.

[4] Connected with the merchet was the fine for incontinence payable to

we find the Parlement of Paris contesting the right of the Duc de Berry to force a girl of eight into marriage. The king's right was exercised frequently by Louis XI., and Louis XII. forced Alain d'Albret to consent to the marriage of his daughter to Cæsar Borgia. The Council of Trent wholly forbade seignorial interference, yet complaints are heard of it as late as 1576 and 1614, and in 1623 it was necessary for Philip IV. of Spain to forbid it in Franche Comté. The royal right was still exercised in France in the seventeenth century. In the eighteenth it died away, save that the king's consent was still required in the case of princes of the blood and grandees. Napoleon made a last effort to revive it.[1]

Nor did the Church get its own way with regard to divorce at one blow. Constantine did not attempt to prohibit divorce, but confined himself to the imposition of pecuniary penalties according to the cause. But Theodosius and Honorius in 421 carried the matter a step further, prohibiting re-marriage in case either husband or wife divorced the other party without sufficient reason. The next step was the abolition of divorce by mutual consent by Justinian; but this step proved unpopular, and the law was repealed by Justin, who substantially re-enacted the Theodosian code; and the Church did not get its way in the Byzantine Empire until the reign of the Emperor Leo.[2]

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the lord, since in the loss of virginity there was a risk that the chance of marriage might be lost and therewith the lord's merchet might never accrue. Yet the merchet appears to have been sometimes paid by freemen, and not universally by serfs. (Vinogradoff, *Villeinage in England*, p. 153.) For a striking picture of the arbitrary marriage of serfs by a Russian proprietor in the modern period, see Kropotkin, *Memoirs of a Revolutionist*, vol. i. p. 61.

[1] Viollet, p. 410–414.

[2] By the law of Constantine, the wife could divorce her husband for murder, the preparation of poisons, or the violation of a tomb. If she divorced him for any other cause, she forfeited her dowry and was liable to deportation. The husband could divorce the wife for adultery, the preparation of poisons, and for acting as a procuress. If he divorced her for any other cause he forfeited the dowry, and if he married again, the first wife could take the dowry of the second. The legislation of Theodosius and Honorius in 421 allowed the wife to divorce for grave reasons, including crime, but if she divorced her husband for moderate faults, including "criminal conduct," she forfeited her dowry, became incapable of re-marriage and liable to deportation. The husband, if divorcing for serious crime, retained the dowry; if for "criminal conduct," he did not retain it but could marry again; if for mere dislike, he forfeited the common pro-

In Western Europe the conquest of the barbarians was gradual. In the eighth and ninth centuries the capitularies absolutely prohibited divorce, yet exceptions were admitted subsequently here and there. In the Canon Law itself traces of a more lenient view appear.[1] Dissolution of marriage for impotence is not in accordance with the Roman custom, but, says a rescript of Alexander III., "if the custom of the Gallic Church so had it, we will patiently endure it."[2] Moreover, a case is recorded in which a husband, having been absent for more than ten years and refusing to return, a bishop had pronounced him divorced, and declared the wife free to marry. Though this decision is not confirmed, and nothing apparently came of it, yet it is held, in view of the bishop's sentence, that the children of the wife in this case are to be deemed legitimate.[3] All these doubts and exceptions were swept away by the Council of Trent, and to the present day in countries dominated by the Canon Law there exists no divorce dissolving the *vinculum matrimonii* by the ordinary law.[4] The Pope, of course, having the power of the Keys, can override all laws, but this does not

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perty and could not marry again. In 449, after an experimental restoration of the law of the early empire, Theodosius specified twelve offences (including cruelty and adultery) for which a wife could divorce her husband. The same *mutatis mutandis* applied to the husband, but he could further go upon the ground that his wife dined with men without his knowledge, left home at night without adequate cause, or frequented the circus, etc., after being forbidden to do so. If he divorced her for any other reason, he forfeited the dowry and property brought into the marriage. If she did so she suffered the same penalty, and could not marry again for three years.

Justinian took the further step of abolishing divorce by mutual consent under penalty of being immured in a monastery, and he re-enacted the Theodosian law of divorce by one party with some modifications of detail. Divorce by mutual consent was re-introduced by Justin and finally abolished by Leo. (Bryce, ii. p. 408, and Howard, ii. pp. 28–33.)

[1] Still more clearly do the Penitentials of this period show the compromise necessary to adjust the Canon Law to Germanic custom. (Howard, ii. 45.)

[2] *Decret. Greg.*, 705. In other chapters divorce for impotence is recognized under conditions. In Gratian's view it would prevent the completion of marriage (for *conjugium confirmatur officio*), but if occurring after consummation, would not be a ground of dissolution. (1149.)

[3] *Decret. Greg. IX.*, *Corpus Juris*, p. 713.

[4] On the other hand, down to the Council of Trent, the recognition of clandestine marriages on the one hand, and the complicated system of restrictions on the other, made the annulment of marriage only too easy. On the whole the marriage tie during the Middle Ages seems to have been almost as loose in practice as it was rigid in theory.

affect the general principle, nor does it bring relief to those who are without the means of setting the spiritual machinery in motion.

11. Both as to the tutelage of women and as to the general power of the father the early Germanic law in large measure reproduced the features of early Rome. Both were modified by the impact of civilization, of the civil law and of Christian influences. But they were modified in different ways. The father's power decayed more rapidly and more completely than the husband's, and while the unmarried woman became personally free, the wife remained *sub virga mariti.*

The primitive German father had the power of life and death over his children.[1] At any rate he could expose them before they had taken food,[2] and he could sell his children certainly, and in most tribes probably his wife also, into slavery. Even in the seventh century the Church has to admit the right of a father to sell a son under seven into slavery.[3] Down to the ninth century the husband was possibly within his rights in killing his wife for a "good" reason.[4] The Lombard law ran, "Non licet eam interficere ad suum libitum sed rationabiliter," and at Worms in the eleventh century witnesses were asked, "Est aliquis qui uxorem suam absque lege aut probatione interfecerit?"[5] The sale of children had been prohibited in the Empire by Diocletian, but the law was found to lead to infanticide, and it was again allowed by Constantine, though at birth only, and that with an option of redemption. It was prohibited by the laws of the Visigoths and by the Carlovingians, but instances in which it occurred are quoted from French law-books as late as the fifteenth century.

[1] Waitz, *Verfassungsgeschichte*, 49. [2] Viollet, 497, 499.
[3] Pollock and Maitland, *History of English Law*, ii. 436.
[4] Viollet, p. 500.
[5] Viollet, *loc. cit.* Even in the Canon Law the murder of a faithless wife is somewhat faintly deprecated. Gratian is at pains to show that the apparent countenance given by Pope Nicholas refers to the practice of civil law alone, but Pope Pius, whom he also quotes, merely says, "Quicunque propriam uxorem absque lege vel sine causa et certa probatione interfecerit aliamque duxerit uxorem, armis depositis publicam agat poenitentiam." (1152.) Gratian himself is clear that the murder of an adulteress is unlawful. (1154.)

The sale of a wife appears in the eleventh century at Cologne,[1] and in the same century Cnut had to forbid the sale of a woman to a man whom she disliked.[2]

While these grosser excesses of marital and paternal power died away during the earlier Middle Ages, the subjection of the wife remained. But of the wife only.[3] From the Conquest onwards the unmarried English woman on attaining her majority became fully equipped[4] with all legal and civil rights, as much a legal personality as the Babylonian woman had been three thousand years before. But the wife was still, if not the husband's slave, at any rate his liege subject. Her personality is merged in his. The law does not hold her responsible even for crimes committed in his presence, and therefore it is presumed under his influence and authority. If she kills him it is petty treason—the revolt of a subject against a sovereign in a miniature kingdom. She could not bring an action against him nor he against her. But of course the theory could not be pushed to its full length. The wife was human, and so, after all, were the legists, and if ill-treated she could go to the ecclesiastical courts for protection, and if the husband was obstinate they could call in the power of the secular arm.[5] The King's Court would punish him for maltreating her,[6] but the right of chastisement remained, and the history thereof, together

[1] Viollet, p. 502.

[2] Pollock and Maitland, ii. 364.

[3] While unmarried women become emancipated, the wife remains subject to her husband's correction. In Normandy, in the thirteenth century, it is held that a man could not be prosecuted for beating his wife, slave, son, or daughter, or any one, "*en sa mesgnie*." And it is the same in other parts of France, though in Flanders the magistrates condemned a husband for beating his wife till the blood flowed. The subservience of the wife was expressed by her waiting at table, kissing the husband's knees and calling him her lord. (Viollet, pp. 503–4.) As to property, however, in France and some parts of Germany a doctrine of community of goods grew up in which the husband had the right of management, but the rights of the wife were considerable. And owing to the law of dower, the French wife in the thirteenth century could institute an action without her husband's consent, which at present she cannot do. (Viollet, p. 293.) Here, however, we touch on the indirect consequences of laws of property, rather than on customs flowing from the central conception of the position of women.

[4] Pollock and Maitland, ii. 437. The writers do not consider it clearly established that a life-long tutela of women ever existed in England, as among the other Germanic peoples.

[5] In 1224 a wife obtained a writ directing a sheriff to provide her with maintenance out of the husband's lands. (Pollock and Maitland, ii. 435.)

[6] Pollock and Maitland, ii. 436.

with the whole theory of marriage thereunto appertaining, is explained with much unconscious humour by Blackstone.

"The very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything." Hence a man cannot grant anything directly to his wife, or contract with her, "for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself." He is bound to provide her with necessaries, but for anything besides necessaries he is not chargeable. She can bring no action without his concurrence, nor be sued without making him a defendant. In criminal cases she may be convicted and punished separately, but she is considered as acting under his orders, and in some felonies (though not murder) she is excused, if acting under his constraint.

"The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with the power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children." . . . "But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, 'aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet.' The civil law gave the husband the same, or a larger authority over his wife, allowing him for some misdemeanours, 'flagellis et fustibus acriter verberare uxorem'; for others, only 'modicam castigationem adhibere.' (Nov. 117, c. 14.) But, with us, in the politer reign of Charles II., this power of correction began to be doubted, and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their antient privilege, and the courts of law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour. These are the chief legal effects of marriage during the coverture, upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."[1]

[1] Blackstone, vol. i. pp. 430-433 (edition 1765).

12. With Blackstone we arrive at the middle of the modern period, and we find the position of woman somewhat anomalous. In particular, the legal status of the married and unmarried woman stood in strong contrast. The gradually deepening sense of personal rights extended itself to women as well as to men, and we have seen that the Church worked along with the growing sentiment of social justice to emancipate the unmarried woman from bondage, and make her her own mistress in the most important matter of her own marriage. Women as such, had few, if any, disqualifications as to the tenure of property, as to inheritance, and as to the full exercise of legal and civil rights.[1] Though still debarred from the professions, they were, generally speaking, competent as witnesses, could sue and be sued like a man, could inherit and bequeath freely; few, if any, relics of the *tutela* remain beyond the years of minority.[2] Further, the sentiment that first becomes marked in mediæval literature had given them a position in the esteem of man which it would be difficult to parallel in earlier thought.[3] Yet in law the whole personality of the married woman was as much as ever absorbed in that of her husband. In this direction the old conception of the right of the husband was modified rather than combated by the influences of religion and the romantic attitude to women and marriage. For if these influences emphasized the beauty of womanliness, it was a beauty which depended on meekness and self-denial. The

[1] Except in relation to property the history of the position of women was broadly alike on the Continent and in England.

[2] I need not here deal with exceptions which are interesting enough as survivals. For certain disabilities in modern French law, see Viollet, p. 291.

[3] Two opposed streams of thought are discerned in the Christian teaching as to woman. On the one hand, Christianity, and particularly Catholicism, was essentially a feminine religion. Its appeal was to the womanly type, and among women at all periods it has found its heartiest response. Though debarred from the priesthood, as saints, martyrs, and virgins, women occupied a high place in the hagiology, and a woman was the mother of God. On the other hand, woman was no less certainly the door of hell, the source of temptations, the corrupter even of the saints. The filthiest view of love and marriage was taken by the ascetics and is embodied in the Penitentials. The horrible saints of the desert could scarcely bear to see a sister or a mother. (Lecky, ii. 127.) A fair estimate of the influence of Christianity as a whole, for which perhaps sufficient material has not yet been accumulated, must at least give full weight to both these tendencies. On the whole subject, see Lecky, especially vol. ii. p. 316, seq.

strength of woman was in her weakness. She conquered by yielding. Her gentleness had to be guarded from the turmoil of the world, her fragrance to be kept sweet and fresh, away from its dust and the smoke of battles. Hence her need of a champion and guardian. Again, in the romantic view of marriage the two beings were united in one, and this was easily interpreted to mean that the woman was merged in the man and against him was rightless, or had a claim to protection only in the most extreme cases. Thus the law, as Blackstone with his sleek satisfaction expounds it, was not far removed from prevailing sentiment either in what it gave to women or in what it withheld. Yet Blackstone wrote two centuries after the Reformation, and the Reformation had already begun to break up the canonical view of marriage. The Reformers differed from the Romish Church in two points of capital importance. They declined to regard marriage either as a Sacrament[1] or as a concession to the weakness of the flesh. On the contrary, they considered it the most desirable state for man. Hence, on the one hand the abolition of celibacy amongst the clergy, and on the other the tendency to treat marriage as a civil contract and the revival of divorce, freedom in which latter respect was advocated by many great Protestant writers, and notably by Milton.[2] But in cutting itself free from the legal and moral structure built up by the mediæval Church, Protestantism failed to provide a clear and consistent standard of its own. The conception of the marriage relation as a civil contract was not at bottom compatible with the rigorous treatment of the most venial sexual irregularity as a religious offence of the deepest dye, and the Old Testament influences which made the husband absolute head of the family suited ill with the measure of equality already conceded to the wife.[3]

[1] *I.e.* not in the magical sense. In the spiritual sense, Luther regarded the word "sacrament," as necessary to express the holiness of the marriage state. (Howard, i. 387.)

[2] Adultery and malicious desertion, widened so as to include cruelty, were reckoned by the continental reformers generally as good causes of divorce, and it was agreed that re-marriage was allowable to the innocent party. (Howard, ii. pp. 62, 65, etc.) The English reformers followed somewhat more cautiously in the same line. (*Ib.*, p. 73.)

[3] The influence of the Old Testament told both ways on the reformers. On the one hand, it aided them in cutting down on the whole to reasonable limits the absurd mass of restrictions on marriage which the mediæval

Hence, even in Protestant countries legislation moved but slowly, and on the whole it was only during the nineteenth century and under new influences that the law of marriage and the position of women underwent a fundamental change. The modern conception of personal rights proved to be incompatible with the old marriage law, and indeed with the mediæval sentiment in regard to women. Applying the doctrine that moral worth and the adequate realization of character imply full responsibility, it has dismissed as a piece of false sentiment the ideal of feminine innocence shrouded from the world, has bade women take their own lives in hand, and in considerable measure broken down the barriers which debarred them from other occupations than that of marriage.[1] Within marriage it has revolutionized the position of the wife, giving back to her the personal independence which she enjoyed under the later Roman law. This change was not consummated in England until the Married Women's Property Acts of 1870 and 1882. As we have seen from Blackstone, women had acquired personal protection from the wife-beating husband during "the

Church had accumulated. On the other, it tended to justify a barbaric view of the prerogatives of the husband, and led Luther and other early reformers to admit polygamy and concubinage.

The fierceness of Puritan sentiment in regard to the sins of the flesh appears to combine Old Testament barbarism with early Christian condemnation of unchastity. The early reformers considered death the appropriate penalty for adultery, and in the American colonies, where Protestantism most influenced legislation, savage penalties were imposed, not only for adultery, but even for the pre-nuptial incontinence of betrothed persons, *e.g.* couples who had children born within seven months of marriage were publicly flogged. See the extraordinary collection of sentences in Howard, vol. ii. p. 169, seq. Here are records of sentences: "A. F., for having a child born six weeks before the ordinary time of women after marriage, fined for uncleanness and whipt, and his wife set in the stocks." "C. E., for abusing himself with his wife before marriage, sentenced to be whipt publicly at the post, she to stand by while the execution is performed. Done, and he fined five pounds for the trouble." (p. 186.)

[1] Though there have been times in earlier history when women have, in fact, taken a prominent part in intellectual or public life (witness, *e.g.* India in Buddha's time), the systematic and reasoned insistence on the claims of women to free admission to any occupation for which they can fit themselves, seem—apart from the case of Plato—to be almost confined to the latter half of the modern period. Works in defence of women's rights appear sporadically in England, France, and Germany, from the end of the seventeenth century onwards. The first which is now at all remembered, however, is probably Mary Wollstonecraft's *Vindication*, published in 1792. (Howard, *op. cit.*, iii. 238, 239.)

politer reign of Charles II.," but their property, except where protected by settlement, remained at the absolute disposal of their lord and master. This protection was a privilege of the daughters of the propertied classes. There was literally no protection for the wife of a drunkard struggling to support her children by the labour of her hands from the husband who should choose to sponge upon what she earned. Such earnings were emancipated from the husband's control by the Act of 1870. In 1882 the same principles were applied to all property; and the English law, which was the most backward in Europe, became in twelve years the most forward, Russia and Italy, strange combination, being the only other countries which fully recognized the independence of the wife's property in the absence of a settlement.[1]

[1] The movement of other countries is, however, in the same direction. Sweden emancipated the wife's earnings in 1874, Denmark in 1880, Norway in 1888; the German Civil Code places the wife's earnings amongst her separate property which is beyond the husband's control. Property bequeathed to the wife is separate only when so stipulated by the donor.

Our Married Women's Property Act applies to England and Ireland only. In Scotland, by the Acts of 1877 and 1881, the wife acquired complete control of her earnings and income from personality. But she may not dispose of the principal sum without her husband's consent.

The French law rests on a wholly different basis to ours, and is not easily to be compared. Here and in other countries such as Belgium, where the law is based on the Code Civile, there is a community of goods between husband and wife, which, in a measure, compensates the wife for a certain loss of liberty. The code states that the husband owes her protection and the wife owes him obedience. She is under an obligation to live with him, and he to receive her and furnish her with everything necessary for the wants of life according to his means and station. She has the absolute right to the one-half of everything he earns, but on the other hand she may not, without authority, alienate property even if it be her own, nor can she sue even if she be carrying on a trade, nor make a contract, without his authorization. On the other hand, if the authorization is unreasonably refused, she may apply for it to a court.

In one direction the primitive marital power is maintained in a modified form in some continental, particularly in Latin, countries. In France the husband still has the right to kill the paramour of his wife taken in the act. This is perhaps of the nature of a concession to the strength of passion. But further, the husband, and he alone, can denounce his wife to the tribunals for adultery, and cause her to be imprisoned for not less than three months or more than two years at his pleasure. "Le mari restera le maître d'arrêter l'effet de cette condamnation en consentant à reprendre sa femme." (Penal Code, 336, 337; Viollet, p. 505.) This is a survival of the law of the Ancien Régime, by which the husband might immure the adulteress in a monastery, or even in a house of correction, by an authority obtained from the king. The imprisonment might be for life.

13. Thus the tendency of the modern marriage law is to guarantee to the wife equality of civil status, with full legal protection for her person and free disposal of her property. We are next to consider its effect upon the permanence of the marriage tie. In the previous stages of the development of marriage which have been traced we have seen it treated—

1st. As an imperfectly-organized relation which does not identify husband and wife as members of one family.

2nd. As an act of appropriation by capture, purchase or service, whereby the wife has passed into a semi-servile relation.

3rd. As a Sacrament, whereby an indissoluble union was created which man could not undo.[1]

4th. In the Roman Law, and perhaps in that of Egypt, as a contract on specified terms, revocable at the will of one party or of both, or finally voidable under certain specified conditions.

The law of modern countries since the Reformation appears to have fluctuated between the two latter conceptions of marriage. Countries which have maintained the rule of the Roman Church, of course, do not allow divorce under any circumstances whatever. This is the case with Italy, Spain and Portugal in Europe; and with Mexico, Brazil, Chili, the Argentine Republic, and most of the South American States. In some states of mixed religions the Canon Law is applied to Catholics: thus in Austria there is no divorce even if one party to the marriage should not be a Catholic.[2] The same rule applies in Hungary.

The German Civil Code breaks wholly with the marital power, by equalizing the crime of husband and wife. Yet it preserves the private character of the offence by making adultery punishable with imprisonment on the application of the injured party.

The Portuguese have erected a monument more durable than brass to the Catholic interpretation of equal moral responsibility by a law which punishes the adultery of the wife with from two to three years' hard labour, and of the husband, if committed under the conjugal roof, with a fine of not less than £2, nor more than £480.

[1] In this relation, the religious marriage may fittingly be enumerated as a distinct type.

[2] In Bavaria and in Wurtemberg, before the consolidation of the German law under the new Imperial code, there was no absolute divorce for Catholics, but the restriction did not apply to mixed marriages. (*Parliamentary Papers*, 1894; Miscellaneous, No. 2, p. 24.)

The Greek Church, adhering in the main to the traditions of the Roman Law as re-modelled by Justinian, allows divorce, and it is an interesting point of historical continuity that the law of divorce in Greece at the present day is, with unimportant amendments,[1] that established by Justinian.[2]

In France divorce was unknown until 1792, and a wife could not even obtain a separation from an unfaithful husband. In that year the Convention went to the other extreme, admitting divorce, not only by mutual consent, but even for incompatibility of temper alleged by one party. There was a re-action under the Directory in 1795, and in 1797 the Church re-affirmed the indissolubility of marriage. Napoleon, however, allowed divorce by mutual consent under some restrictions.[3]

[1] *Parliamentary Papers*, 1894; Misc., No. 2, p. 81.

[2] The law of the Greek Church is followed pretty closely in Servia. Divorce cases are tried by the Spiritual Courts, and the grounds are: Adultery, an attempt on the life of either consort, treason, leaving the Church, "if the wife without the husband visits the baths, beer gardens, or other suspicious places with men, or if the husband brings strange women into his house, or keeps them elsewhere," an accusation of adultery against an innocent wife, or urging her to unchastity, condemnation to seven years' imprisonment, desertion for seven years or for three years, if the husband has left the country and cannot be traced, or for four years if it is proved to be wilful.

In Russia the rules of divorce vary according to the religion of the parties, but it is admitted both for the Russo-Greek and the Lutheran in cases where the fault of one party has violated or practically nullified the marriage contract. (*Parly. Papers*, *ib.*, 128.)

In the case of members of the Russo-Greek Church, the grounds of divorce are: Adultery (though only when provable by an eye-witness), impotence, a sentence involving a loss of civil rights, five years' desertion. It should be noted that the guilty party may be condemned to celibacy for adultery. Among members of the Lutheran Church the grounds are: Adultery, pre-nuptial unchastity of the wife, attempt to poison, five years' desertion, repugnance to marital intercourse, refusal to fulfil conjugal duties, incurable infectious disease, madness, depravity of life, cruelty and offensive treatment, attempted dishonour, unnatural propensities, crimes involving capital punishment or penal exile.

In Roumania divorce is allowed by mutual consent of the parties, provided that the court is satisfied that the maintenance of a common life is impossible, that the separation is sanctioned by the parents, and provision is made for the maintenance of the wife and children. (*Parly. Papers*, *ib.*, pp. 126, 127.)

[3] The husband had to be over 25, and the wife over 21; they must have been married more than two and less than twenty years. The approval of the parents was required, and a proper agreement had to be made for the maintenance of wife and children. In other respects, however, the law was not equal between husband and wife, as she could not claim for divorce

On the restoration of the Bourbons divorce was entirely suppressed (1816), and though its re-introduction was voted by the Chamber in 1831, it was thrown out by the Peers, and there was no divorce in France until 1884. Under the law of that year and of 1886 the grounds of divorce are equal for either party, and are—

(1) Adultery.

(2) { Excès. Sévices. Injures graves.

(3) Conviction for crimes involving certain aggravated punishments.

"Excès" is interpreted to mean acts of violence endangering life; "sévices," other acts of violence; while as to "injures" involving lesser misconduct, the Courts have a wide discretion. They take it generally to cover calumnious imputations, desertion, refusal of cohabitation, and habitual drunkenness.[1]

In Germany the revolutionary epoch left its mark, and by the Prussian Code of 1794 divorce was allowed for any of ten causes, including mutual consent in case of insuperable aversion where the marriage was childless, and even if there were children where the cause was held good by the judge. But under the new civil code, which came into force on January 1, 1900, the conditions are more stringent, the grounds recognized being—

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for adultery unless with certain aggravations. (Jeune, art. "Divorce" in *Encyclop. Brit.*)

[1] Belgium preserves the Imperial Code of 1803, but Holland, though the law of marriage is, in general, based on that code, restricts the grounds of divorce to adultery, malicious desertion, imprisonment for over four years, and ill-treatment endangering life. (*Parly. Papers, ib.*, pp. 33 and 100.) The Grand Duchy of Luxembourg, keeping closer to its original, "allows the mutual and continued consent of both parties" under legal conditions and tests to be "a sufficient proof that life in common is insupportable to them." (*Parly. Papers, ib.*, p. 90.)

In Switzerland the causes recognized are: Adultery, attempt on the life of either party, great ill-usage, serious injury, sentence to a degrading punishment, desertion for two years after a judicial order to return, mental derangement; and finally a divorce or separation for a period of two years may be granted, for other "circumstances seriously affecting the maintenance of the conjugal tie," and at the expiration of the two year period the grant is renewable. The Swiss law has in consequence come in for some criticism as facilitating the dissolution of marriage for trivial causes. (*Parly. Papers*, Misc., No. 2 of 1894, p. 150.)

(1) Adultery; which, it is to be observed, is further punishable by imprisonment on the application of the innocent party.

(2) Endangering of life.

(3) Desertion.[1]

(4) Insanity.

(5) Gross neglect of duties by one of the parties or the leading of such an immoral or dishonourable life as entirely destroys the conjugal relations.

Denmark,[2] Sweden[3] and Norway[4] recognize adultery, desertion, and conviction of serious crime, as causes of divorce.

Thus the divorce laws of Europe present an almost bewildering variety. To find some order and method in them we may group them under four heads.

There are (1) the countries which remain under the Canon Law and admit no divorce.

There are (2) countries or populations governed or influenced by the law of the Greek Church, running back to Justinian.

There are (3) the countries governed or influenced by the Code Napoléon.

And (4) there is the group of Protestant countries.

The common tendency in the last three cases is to place divorce upon an equal footing for both parties, and to permit it in all cases where the act of one party without the collusion of the other has practically nullified the marriage contract. Thus desertion and conviction of serious crimes are generally recognized causes; but in countries influenced by the Code Civile the element of personal injury is especially pressed, and where this is loosely interpreted divorce becomes easy. In the Protestant countries conviction of crime and the distinct refusal of one party to perform his or her duty is more prominent.

[1] Provided that the guilty party has for one year refused to obey an order for restitution of the conjugal life, or has refused to cohabit for one year, having gone abroad or to such place as makes communication difficult. (*Parly. Papers*, Misc., No. 2, 1903.)

[2] *Parly. Papers*, No. 2, 1894, p. 53. [3] *Ib.*, p. 146.

[4] *Ib.*, p. 147. The term of imprisonment supplying adequate ground for divorce has been reduced by the law of 1902 to a period of six years, or to imprisonment exceeding three months for any crime against the petitioner, or finally to imprisonment irrespective of duration for specified crimes of an outrageous character. A sentence for vagrancy, intemperance, and other ill-conduct, may also be a ground of divorce.

14. In the United Kingdom the history of the Divorce Law is altogether peculiar. The Scottish Courts began to grant divorces soon after the Reformation, and in 1573 recognized desertion, as well as adultery, as a cause; this remains the Scottish law to the present day. But in England the course of events was different. The Commission appointed by Henry VIII. and Edward VI. recommended divorce for adultery, desertion and cruelty, and Lord Northampton (*temp.* Edward VI.), who married again after a separation *a mensa et thoro* was held justified, but the recommendations of the Commission never became law, and in Foljambe's case at the end of Elizabeth's reign marriage was held indissoluble. In 1669 the first divorce was granted by private Act of Parliament, but there were only five such Acts before George I.'s time, and it was not till 1857 that divorce was allowed by English law, and this law differs from that of the majority of continental countries in not recognizing the practical destruction of the marriage life through desertion, crime or drunkenness as a ground for anything more than separation. Neither does it place husband and wife on an equal footing. Down to 1884 the Courts could enforce an order for the restitution of conjugal rights by imprisonment, but in 1884 this power was withdrawn, and in the Jackson case, a few years later, it was apparently held that though such an order could be obtained by a husband or wife, it could neither be enforced by the Courts nor could the injured party be allowed to enforce it for himself. Thus the tendency of recent English legislation has been to facilitate separation, but not to enable him or her who has made the mistake of marrying a confirmed criminal, a lunatic or an habitual drunkard to marry again.

The British Colonies, and with them, of course, the United States, started with the English law, but have for the most part modified it in the direction of greater liberty. Canada forms the exception. In the Dominion, under the influence of the Roman religion, no divorce courts have been instituted, and none exist except in Nova Scotia, New Brunswick, Prince Edward's Island and British Columbia, where they had been instituted before the Union, and where the conditions of divorce are the same or nearly the same as under English law.[1]

[1] *Parly. Papers*, 1894, vol. 70, part iii. p. 54 ff.

In South Africa the Roman Dutch Law in Cape Colony recognizes adultery and graver sexual offences, malicious desertion, perpetual imprisonment, long absences and refusal of marital privileges as grounds of divorce, but in practice it appears that only the first two causes are brought forward. Natal also recognizes desertion in addition to adultery.[1] In the Australasian group divorce is either on the English lines or modified so as to admit desertion, drunkenness and crime as grounds.[2]

15. The divorce laws of the United States form a study by themselves, and the utmost that I can attempt is a summary of the principal features. In one State or another twelve different causes of divorce are recognized; they are—

(1) Adultery. This is recognized generally as a ground of divorce.

(2) Bigamy. General.

(3) Impotence. General, but as a rule with the requirement that the plaintiff must be ignorant of the fact at the time of marriage.

(4) Idiocy. Most States.

(5) Wilful desertion. The term varying from six months to five years. This is usually a ground of absolute divorce, but

[1] *Parly. Papers*, cd. 1785 (1903), p. 21.

[2] Southern and Western Australia, Queensland and Tasmania adhere to English law. (*Parly. Papers*, 1894, vol. 70, pp. 15, 16, 33, 95.) New South Wales places husband and wife on an equal footing in the matter of adultery provided the husband is domiciled in the colony. (*Parly. Papers*, 1903, cd. 1785, p. 13.) It also recognizes desertion, cruelty, conviction for crime, and habitual drunkenness; while, further, it is a ground of divorce if the wife has "habitually neglected or rendered herself unfit to discharge her domestic duties; or if the husband has habitually left the wife without the means of support." (*Ib.*, p. 14.) Victoria recognizes desertion, imprisonment and habitual drunkenness. This must be coupled in the case of the husband either with cruelty or with the charge that he has "habitually left his wife without means of support;" on the part of the wife, "with neglect of her domestic duties." Adultery by the husband in the law of this colony is only a sufficient ground of divorce if committed in the conjugal residence, or coupled with circumstances or conduct of aggravation. (*Parly. Papers*, 1894, vol. 70, part i. p. 19.) New Zealand, which, till 1898, adhered closely to the English law, now recognizes imprisonment for serious crime, desertion and habitual drunkenness, coupled with cruelty on the part of the husband, or habitual neglec of domestic duties on the part of the wife. (*Parly. Papers*, 1903, cd. 1785, p. 16.)

sometimes of separation only, and as a rule the deserted party must not have consented to it or have rejected reconciliation.

(6) Absence. New Hampshire and Connecticut.

(7) Neglect of husband to support wife. Twenty States, but in some of these it is a ground of separation only.

(8) Habitual drunkenness for a term of years. Almost all States.

(9) Use of opium. Two States.

(10) Conviction of felony. The greater part of the country.

(11) Extreme cruelty. Almost all States, but in some only as a ground of separation.

(12) Indignities to the person. Eight States.

To these may be added a variety of causes, recognized in one State or more. In Illinois divorce may be given at the general discretion of the Court.[1] In Washington[2] divorce may be given for any cause deemed by the Court sufficient, and when it shall be satisfied that the parties can no longer live together. In South Carolina there is no divorce at all.[3]

[1] The summary given in the text is derived from *Parly. Papers*, 1894, Misc., No. 2. The statements given by Mr. W. F. Wilcox (*Encyclop. Brit.*, Ed. X. article "Divorce") may be summarized as follows:—In six out of seven States divorce is allowed for adultery, desertion, and cruelty; in thirty-nine States for imprisonment, in thirty-eight for habitual drunkenness, in twenty-two for neglect to provide. In all States but two, complete separation lasting from one to five years is a ground of divorce. (*Ib.*, art. "Marriage," p. 549.)

[2] Bryce, *Studies in Jurisprudence*, ii. p. 440.

[3] The charge brought by critics of the United States marriage laws, however, is not so much directed against loose rules of law, as against lax interpretation by courts. This is carried so far in some States, that it would seem as though divorce were placed at the free disposal of either party. One wife alleges that her husband "has never offered to take her out riding"; another, that he quoted verses from the New Testament about wives obeying their husbands; a third, "that he does not come home till ten o'clock at night, and when he does come home he keeps plaintiff awake talking." These cases, with further details which have their ludicrous side, are quoted by Mr. Bryce, *op. cit.*, vol. ii. p. 445, from a report of the United States Labour Bureau of 1880. The number of divorces granted in the Union increased from 9,937 in 1867, to 25,535 in 1886, a proportion of 250 to 100,000 married couples. In some of the laxer States, however, the proportion is much higher, there being in Ohio, for instance, some 3,000 divorces annually to from 33,000 to 44,000 marriages. In two-thirds of the suits the wife is the plaintiff, but statistics combat the suggestion that desire for another marriage is the common cause of divorce. Thus in Connecticut, where the figures are best available, only one-third of those divorced remarry in each year. A further point of high importance is that the

16. Comparing the divorce laws of modern states as a whole, the general tendency, notwithstanding the bewildering differences in detail, is tolerably clear. Legislation moves in the direction of allowing divorce for adultery, cruelty, persistent desertion, habitual drunkenness, serious crime—in short, for such behaviour of one party as makes the married life impossible or unbearable to the other. On the other hand, we find no marked tendency to the Roman system of divorce by mutual consent. On the contrary, anything of the nature of collusion between the parties is frequently a bar to proceedings. Marriage is on the whole regarded as a contract, but not like other contracts, voidable by the agreement of the parties to it. Its dissolution is regarded as a relief which one party may claim on the ground of the other party's delinquency, and in a measure as the punishment of that delinquency, rather than as the voluntary annulment of a bond, in which the function of the State is to see that no fraud is committed, and that the involuntary parties to the original contract, the children, do not suffer.

But though a contract of a peculiar kind, marriage in modern legislation is distinctly a contract rather than a sacrament—a relation which binds two parties together without annulling the legal personality of either, and terminable by the fault of either. In ethics the change that it has undergone may be expressed by saying that from being a sacrament in the magical, it has become one in the ethical, sense. Regarded as a magical sacrament, marriage is a rite which removes the taboo on sexual intercourse between a man and a woman, while at the same time imposing a lifelong taboo on the intercourse of either of them with a third person. As an ethical sacrament, marriage is the fruition of perfect love, in which at its best men and women pass beyond themselves and become aware through feeling and direct intuition of a higher order of reality in which self and sense disappear. If it is not given to all to obtain this best, yet the humbler lessons of unselfishness and mutual aid are

number of divorces in proportion to the population does not vary with the number of causes for which divorce can be obtained. *E. g.* in 1880, New York admitted adultery only as a cause ; New Jersey added desertion, and Pennsylvania further added cruelty and imprisonment. Yet New York had 78 divorces per 100,000 couples ; New Jersey 26, and Pennsylvania 16. (Howard, iii. 217.)

learnt by ordinary men and women in greater or less degree from marriage, and seldom effectually learnt from other sources. But this ethical conception implies the retention of full personal rights by the wife, and though doubtless realized often enough under the older quasi-servile marriage, this is because the facts of human nature and the relations based upon them cut deeper than all law, and wives have been men's helpmates and sometimes their tyrants even when law made them most abjectly their slaves. The modern view of marriage recognizes a relation that love has known from the outset. But this is a relation only possible between free self-governing persons. If it be true that "woman is not undeveloped man, but diverse," that diversity will best express itself through her freedom to act as a responsible agent, and only when so expressed can we justly measure its character and amount. Such freedom is the basis of marriage as an ethical sacrament, and that conception of marriage is accordingly bound up with the general liberation of women.

In the lowest stages of society the life of women is less differentiated from that of men than it afterwards becomes, but there is a tendency for the heavier drudgery to fall on them, while the men do the hunting or fighting. At a higher stage the sphere of woman becomes more clearly restricted to the house. She does hard outside work only when compelled thereto by poverty, and the idea grows that she should be protected by her men-folk and as far as possible sheltered from the world. She becomes a different being, romantically conceived as of finer, more ethereal, texture than the male, but is practically allowed no will or character of her own. At a still further stage the ethical conception of personality comes into play. To be the ideal being that man would have her it is recognized that woman must be a responsible agent, and it is seen that her special talents and qualities must have all the scope which freedom gives to come to the fulness of their development, while it is only through free development that the extent of her differentiation can be determined. Roughly parallel to this movement of thought is the evolution of the marriage tie as we have traced it—the natural family at first incomplete and the marital relation loose and uncertain; next, a close union under the lordship of the husband, based in its lower forms on proprietary right, and at a higher

stage on religious sanctions; and finally, a union, not less intimate because less mechanical, between two free and responsible persons, in which the equal rights of both are maintained, based not on a magical sacrament, but on the most sacred human relation.

CHAPTER VI

RELATIONS BETWEEN COMMUNITIES

1. In the early stages of ethics, rights and duties do not attach to a human being as such. They attach to him as a member of a group. A stranger may enter a community with a safe conduct, or under the protection of some god or some taboo. He may come as a guest under the ægis of his host. But except under such special conditions he is destitute of rights. The members of the community will give him no protection because he is not one of themselves. They stand by one another, but except for such special reasons as have been mentioned have no concern with outsiders. Morality is in its origin group-morality. This division between the community and the stranger cuts deep into the ethical consciousness. In primitive society it implies a very narrow circumscription of the ethical area, since primitive societies, besides being exclusive, are generally small. But far from being confined to primitive society, the essential features of group-morality are maintained with great persistence, though in very varying shapes, into the higher civilizations. Civilized humanity is still organized in groups, and there is still a deep distinction between the obligations binding members of the same group to one another and those which are recognized as holding as between members of different groups. Every independent nation is such a group. In greater or less degree every distinct class within a nation is such a group. Religious bodies, political parties, all sorts of voluntary associations, and finally the family itself, are other instances.

But here one distinction is to be noted. All these groupings may be the basis of special obligations, but it does not follow

that they all alike maintain group-morality in its distinctive features. For these distinctive features consist not so much in the recognition of special obligations as in the denial of more general rights and duties arising out of more general relations. The special and the general need not necessarily conflict. The one may supplement the other. It is where a wider obligation is ignored or overridden in favour of the narrower that we speak of group-morality.[1] A great part of the comparative study of ethics consists in tracing the forms assumed by group-morality and its modification by wider ideas of obligation, and much of ethical evolution is constituted by the interaction of the two principles. In the present chapter and the next we shall consider the two departments in which this evolution appears to be of the greatest importance. We shall begin with the mutual relations of independently-governed communities and their respective members.

2. Early society is, as has been said, organized generally in small groups, and between these groups and their respective members there is not, except under special conditions, any bond of mutual regard. Hence, man being a pugnacious creature, it is natural that they should, in the absence of any external influence, be frequently in a condition of strife. There are, indeed, a few tribes to which war is unknown. Such were some of the Esquimaux.[2] Such are one or two small, favoured and isolated South Sea Island peoples;[3] but these cases are almost always those of small populations, separated by physical obstacles from the wider world.[4] Keeping to our method of characterizing the savage state by the features which, without being universal, are never-

[1] The term is of course one of disparagement, so far as we assume the correctness of the modern point of view. It may, however, be, and at times has been, that the more humanitarian view is too crudely expressed, and the group-morality which protests against it may then prove to be relatively right.

[2] For example, the people of Baffin's Land had no warfare, and Ross could not make them understand the meaning of battles. (Reclus, 108.)

[3] The Lower Carolinas are said by Waitz to live at peace, while furnishing the upper islands with arms. In the small islands of the Tokilan and Ellice group no weapons are known except those washed ashore, which are stored in the temples. (Waitz, v. ii. 190.)

[4] The Todas, a small tribe of Indian aborigines, have also the character of being most pacific, and are said to use no weapons. (Reclus, pp. 182–3.)

theless predominant, we may on the whole accept the general view that in the savage and barbarous state each tribe, except in so far as bound by special agreements, is in a condition of moral isolation from its neighbours. Their members have no assured rights within its bounds, and the tribes themselves are potential enemies rather than natural friends. The actual frequency and seriousness of warfare, of course, vary very greatly, according to the more or less martial character of the people, their geographical conditions and economic circumstances. Regular organized war implies a certain social development, and is hardly to be found at the lowest grades, but we find "a sort of" warfare in the form, perhaps, of perpetual predatory raids, as where an outcast tribe like the Bushmen live largely by pillaging its more settled neighbours, who reply whenever they can with pitiless massacres.[1] We find fighting arising from disputes about the infringement of the tribal border—the "frontier incidents" of savagery—as often among the Australian clans.[2] It may arise out of personal injuries, the capture of a woman or the slaying of a man, which the injured tribe is determined to resent. In this latter case there is no very deep distinction between a war of distinct tribes and the blood feud of two clans within a tribe. In both cases the fighting may be of the nature of a trial by combat, and so it is perhaps that we find here and there a regular arrangement of the campaign in which time, place, and even the number of the combatants and their weapons are predetermined. Thus in the Malay region clan disputes are sometimes settled by duels, or by battles arranged at fixed times and places. Among the Battas of Sumatra the relatives of the combatants mingle freely while the war is in progress. Yet the actual fighting is waged to the extermination of the beaten party, saving always its chief.[3] The tale of the Horatii and Curiatii

[1] Letourneau, *La Guerre*, pp. 56, 57, quoting Moffat, *Twenty-three Years in Central Africa*.

[2] Letourneau, *ib.*, p. 29. Border relations, however, according to Messrs. Spencer and Gillen (*Native Tribes of Central Australia*, p. 32), are generally amicable, and there is no such thing as a constant state of enmity.

[3] Waitz, v. i. pp. 161, 162. In some peoples, though there may be no precise arrangements as for a judicial combat, a very little bloodshed seems to appease the martial ardour of the combatants. Thus among the Micronesians, it is said, wars break out on small pretexts, but on the death

preserves the memory of a custom of "representative fighting" among the early Latin tribes, and instances occur in Greek history down to the sixth century.[1] We may perhaps connect with this range of ideas certain indications of what we might call a sportsmanlike view of war. Instances might be found among the North American Indians—for example, in the story of the Arkansas giving a share of their powder to the Chickasaw to fight them with, or of the Algonquin refraining from pressing an attack on the Iroquois on its being pointed out that night had fallen.[2]

Apart from this half-judicial, half-chivalrous view, the warfare of savage and primitive societies is not always without its rules and limitations. Often an open and honourable declaration of war is insisted on, as among the Kaffirs,[3] and in early Rome.[4] The persons of envoys are as a rule respected, and often women are employed for this purpose. Agreements are understood and bad faith is condemned.[5] We even hear of instances in which the use of poisoned weapons is avoided,[6] and in which permanent injury to property is forbidden.[7]

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of two or three warriors the rest run away, and offer gifts which terminate the war. Yet prisoners are often tortured and the land laid waste. Waitz, v. ii. p. 132.

[1] Herodotus, Bk. i. chap. 82.

[2] Waitz, iii. p. 154. For a similar case among the Australians, see Letourneau, *op. cit.*, p. 33.

[3] Waitz, ii. p. 398.

[4] Cicero, *De Republica*, ii. 17, quoted in Bruns, p. 11.

[5] *E.g.* the N. A. Indians had their regular flags of truce, peace councils, and pipes of peace. (Catlin, *N. A. Indians*, ii. p. 242.) In early Rome those who offended against a foreign nation by an attack on envoys, were made over to them (*deditio*) to deal with as they pleased. By an intricate perversion of moral sentiment, the people might refuse to ratify a truce made by a general in the field on its behalf, but in that case surrendered the general, as though it were he who had broken his word to the injured enemy. By this vicarious sacrifice the commonwealth was to be relieved from all guilt (ut populus religione solvatur), the injury being put on to the head of the general who had done his best for it (quandoque noxam nocuerunt . . . ob eam rem hosce homines vobis dedo.) (Livy, ix. 10. Ihering, *Geist des Römischen Rechts*, i. 131.) In all this, however distorted, a feeling of the obligation of good faith between nations is indubitably present.

[6] *E.g.* among the Kaffirs. Waitz, ii. 398, 399. According to this authority, the Kaffirs also avoided the starving out of an enemy, and, generally speaking, showed a certain chivalry in war which they have unlearnt in contact with the whites.

[7] Among the Eastern Carolinas, the victor carries off the movables, but does not take the land of the vanquished, and avoids cutting down their

3. But while war, like other departments of savage life, has its customs and obligations, and while in some of them we can trace germs of moral feeling, of honour and fair play, we must not blind ourselves to the broad fact that this same rule of custom generally lends to savage warfare something of the character of a personal feud. We shall not be far wrong in saying of uncivilized warfare in general terms that it is in its essence as much a struggle between individuals as between communities, that the conquered enemy has no recognized rights of immunity to protect him, but that his person and property, his wives and children, stand at the mercy of the conqueror. As in other departments of ethics, so here we find that this principle is not always pushed to an extreme. There are all manner of variations in the rigour with which it is applied, and still more in the practical consequences drawn from it. Here and there we find touches of humaner feeling investing themselves with a religious sanction. In other cases social circumstances mitigate the lot of captives. But in the main the defeated enemy is rightless, and is treated as best suits the victor's convenience.

This will readily appear from a brief survey of the possible alternatives in the treatment of prisoners. Quarter may be refused altogether, or if the prisoner is taken he may be enslaved, tortured, eaten, adopted, ransomed, exchanged, or liberated.

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fruit-trees. (Waitz, v. ii. pp. 118, 119.) Even the Book of Deuteronomy, which lays down a kind of ideal code of extermination, based on religious principles, deprecates the cutting down of fruit-trees, but rather for the advantage of the invader than for any more magnanimous motive: "For thou mayest eat of them, and thou shalt not cut them down: for is the tree of the field man, that it should be besieged of thee?" (Deut. xx. 19.) Quaint illustrations of savage chivalry occur where some primitive conception, colliding with the ordinary instincts of warfare, places enemies under a sacred obligation to each other. Instances may be found among some of the Indian hill tribes, for whom hospitality is so sacred a duty that a defeated enemy can avail himself of it against his conqueror. M. Reclus, p. 261, mentions the case of a Bengalese clan being driven out of their homes by an enemy, and coming to claim asylum as guests with their conquerors, to whom they proved so expensive as lodgers, that it became more profitable to restore the lands and goods taken from them. The same author mentions the case of a murderer playing the same trick upon the father of the murdered man, who not only could not touch him as long as he was his guest, but was compelled to support him—a situation which could only be paralleled by that of the N. A. Indian widow, who might be appeased for the murder of her husband by the adoption of the murderer in his place.

Further, a distinction may be and in practice often is drawn between the adult males among the enemy on the one hand and the women and children on the other, *e. g.* the males may be put to the sword, while the women and children are enslaved or perhaps adopted. Coming now to the actual practice of savage and barbarous races, we find that, at least so far as regards males, the milder alternatives are by far the rarer. Of exchange there are one or two instances among the North American Indians, for example, in the tribes of New California, where, though enemies are killed in battle, they are not scalped, and prisoners are not enslaved, but exchanged.[1] Ransom is also very seldom understood by savages, but the Creek Indians were said to adopt boy and girl prisoners and to hold grown men and women for ransom, though apparently they were also subject to an ordeal, as it is stated by the same authority (an eighteenth-century writer who lived among them) that the women of the tribe were wont to make payment in tobacco for the privilege of whipping prisoners as they passed.[2] The third alternative was that of adoption, which, especially among the North American Indians, forms the main exception to the rule that the prisoner is only saved in order to become a slave. For several tribes saw another use, based upon another phase of savage ideas, to which he could be put. They might impersonate the deceased warriors of the tribe. It is a part of savage make-believe that one man can stand for another, that a man's personality can be transferred, possibly by the supposed tranfusion of the soul, possibly by a ceremonial investiture with the names, rights and possessions of the deceased. It was a fairly common practice among the Red Indians to spare prisoners for this purpose. They had, in the first instance, to undergo an ordeal, a severe whipping or other torture, and then, if a widowed woman of the tribe chose to adopt one as her husband, he might live and become a member of the tribe, replacing the dead man in every respect, as husband to his widow, as father to his children, as bearer of his totem, as

[1] Waitz, iv. 241. But they would seem to take women captives, as one of their war-songs begins: "Let us go, leader, to the war, let us go and make booty of a fine maiden." Catlin, ii. 71, relates that the Comanches kept a little white boy as a prisoner, and finally exchanged him for three members of their own tribes bought by the whites from the Osages.

[2] Caleb Swan in Schoolcraft, v. 280.

successor to all his rights and duties—in short, as perpetuating his personality.[1]

To pass to the more severe alternatives the refusal of quarter in battle is widespread. In North America we find it in place of either torture or adoption among the Apaches,[2] the Chippewyans,[3] and generally among the Californian tribes.[4] In negro warfare the defeated are often annihilated. The men are killed, sometimes for eating, sometimes merely for the killing; the women and children are sometimes killed, sometimes enslaved. The Waganda and the Masai killed all the adult males, the Bechuana took no prisoners. The Fans took them, but ate them. The Gallas first massacred indiscriminately in Abyssinia; they

[1] Catlin gives it as the general practice of the Indians known to him that they inflict appalling tortures on their prisoners, in sufficient numbers to atone for those similarly dealt with by their enemies, while the remainder were adopted as husbands by widows in the tribe. (*Op. cit.*, ii. 240.) The element of fiction comes out strongly when we learn that a boy may be adopted in place of a deceased husband, and is then called father by the children of the deceased. (Schoolcraft—Drake, i. 218–220.) Among the Dakotas male prisoners were seldom taken, except by previous arrangement, which would be made when the warriors of the tribe wished to take one or more for adoption to recruit their number. The fate of the warrior would in this case depend upon the decision of the war-chief. (Schoolcraft—Drake, i. 188.) Among the Iroquois, prisoners had to run the gauntlet all through the villages lying near the line of march. At the journey's end they might be adopted by those who had lost relations, and when bereaved families were satisfied, if the remaining prisoners seemed desirable acquisitions to any family the gauntlet test would be applied to them. They would be lashed by the women and children, and those who fell from exhaustion under the ordeal would be dispatched, the survivors being adopted. It should be added that when adopted captives became discontented with their new life, they were in some cases set at liberty. Adoption, as already mentioned, was in this tribe the rule for the treatment of women and children captives. (Schoolcraft—Drake, i. 218, 247. Morgan, *League of the Iroquois*, 341–4.) Morgan adds that a distinguished chief was sometimes restored to his own people as a mark of admiration. He was then bound in honour not to fight against his conquerors in future.

Outside the North American Indians we do not hear much of adoption, but according to De Rochas, quoted by Letourneau, *op. cit.*, p. 49, it occurs in New Caledonia, presumably when the victor's larder does not need replenishing, or when the need of making good the losses of the village is more pressing. Similarly among the Andamanese, Man, *J. A. I.*, xii. p. 356, states that though women and children may be killed in a night attack on a village, the child, if taken alive, would be treated kindly, in the hope of inducing it to join the captor's tribe.

[2] Reclus, p. 128, but Waitz, iii. 157, says that the Apaches sometimes tormented their prisoners, sometimes sold them.

[3] Waitz, *loc. cit.*

[4] Powers, *Tribes of California*, 405.

now castrate their male prisoners.[1] But mere killing did not always suffice; an easy death might be too good a fate for an execrated foe. Torture, which, as is well known, reaches its most extreme development among the North American Indians, seems to be due to no more recondite motive than that of revenge. Thus, according to Catlin,[2] prisoners are tortured in sufficient numbers to atone for those similarly dealt with by their enemies; and it is stated that children are encouraged to take part in the process in order to instil hardness and vindictive feelings into their minds. The rude Takhali, according to Waitz,[3] give their children a regular training in cruelty, especially to animals—as though this were necessary. Torture is commonest among the Eastern and Southern tribes of North America, and did not occur among *all* the tribes of the West.[4] The horrible history is only lightened by the extraordinary stories of fortitude with which it was borne and by occasional instances of self-sacrifice, such as that of a certain Chippewa chief, Bi-am-wah who, having been taken captive, was saved by his father, a noted warrior, who voluntarily surrendered himself to the conquering tribe and offered himself for torture in his son's place. It is one of the few gleams of light which break the darkness of savage history to read that later in life the rescued Bi-am-wah made an agreement with the Sioux by which the burning of prisoners was stopped on both sides.

The next alternative to torture is that of cannibalism. Cannibalism may have either a magical, or a religious, or a purely materialistic value; and, as warfare develops and becomes systematic, and especially as some barbarous tribe consolidates itself and grows stronger than its neighbours, the practice assumes gigantic proportions. Prisoners are not merely killed and eaten on the spot,[5] but are taken home, well treated and fattened for the slaughter, possibly provided with a wife and

[1] Post, *Afrik. Jurisprudenz*, i. 84, 85. [2] Catlin, ii. 240.

[3] Waitz, iii. 117.

[4] Waitz, iii. 157. Except among the North American Indians, I find the torture of prisoners but rarely referred to by ethnologists, unless as an incident of cannibalism, human sacrifice, or the slave trade. But Waitz, v. ii. p. 134, attributes the practice to some Micronesians. It was not uncommon in mediæval Europe.

[5] The suggestively named "Niam-niam" are said to advance to battle with the cry, "Meat, meat! To the oven, to the oven!" (Letourneau, p. 86.)

encouraged to breed a family for the same purpose. There comes, indeed, a stage, perhaps the most revolting in the history of human development, at which the weaker tribes are made almost to perform the functions of cattle in the economy of life for the stronger. This tendency is accentuated by the parallel development of human sacrifice, whether for religious or magical reasons. The human victim may be a feast for the gods. Or it may be that by eating the dead man, and particularly by eating certain parts of him, such as his heart,[1] the conqueror is held to acquire his virtues, or some occult influence is supposed to be exercised upon the crops, the weather, the stability of a bridge, or the fortunes of war.

Cannibalism is or has been widely spread[2] throughout Africa, Oceania, South America and the Malay region (though it would be too much to say that it was general anywhere), and often where it is not now a flourishing institution there are distinct traces of it in legend[3] or, as among the Micronesians and the Andamanese, in the belief that strangers or neighbouring tribes[4] are cannibalistic, or again in certain magical rights and customs having a cannibalistic significance. The Melanesians are not cannibals, yet they will eat a piece of a dead man's flesh to establish communion with his ghost.[5] Among the North American Indians, where it is rare within the times of which we have a record, we have phrases like "eating the heart of an enemy and drinking his blood," which probably are not mere metaphors.

[1] For example, among the Yoruba hearts are regularly sold to give courage. (Ellis, *Yoruba-speaking Peoples*, p. 69.)

[2] It is not, of course, confined to captives, though they are the handiest material if available. Sometimes the aged are eaten, as among the Battas of Sumatra. (Waitz, v. i. p. 189.) Sometimes the young. For example, among the Central Australians, a younger child is eaten in order to give strength to an elder. (Spencer and Gillen, i. p. 475.) Sometimes a slave. Sometimes it is a gruesome punishment, *e. g.* for adultery, treason, espionage, and robbery by night among the Battas, who also eat their prisoners. (Waitz, *loc. cit.*, 188.)

[3] Enemies are still eaten in the Luritcha tribe of the Central Australians. Among the Arunta, cannibalism, if not wholly discarded, is very slightly practised, but its memory lives in many traditions of the "Alcheringa"—the Australians' "great long ago"—and some of the Engwura ceremonies are thought to represent its suppression. (Spencer and Gillen, I. 324, 473–5.)

[4] The Ainus of the Tokapchi district are particularly addicted to night attacks, and are alleged to have been cannibals, and are even now abhorred by their neighbours. (Batchelor, *Ainu of Japan*, 288.)

[5] Codrington, *J. A. I.*, x. 285.

The Sioux, who in later times abhorred cannibalism, used at one time to eat the heart of an enemy. The Chippewas are said to have practised cannibalism. The name "mohawk" means "man-eater," and in certain tribes there were special societies of cannibals who were deemed to possess magical powers.[1] Passing to tropical America, the Caribs, who lived a blameless and well-ordered life among themselves, made such frequent cannibal raids that the very name of "cannibal" is supposed to be a corruption of their tribal name. In Guatemala and Nicaragua, prisoners were generally[2] sacrificed and eaten, while it was in ancient Mexico that cannibalism and human sacrifice reached probably their greatest development in history. The Mexicans maintained an eternal warfare with the Tlaxcala in order that the supply of captives for sacrifice might be kept up. The victim was identified with the god, and his killing and eating meant a resurrection of the god and a renewal of his strength.[3] According to the Mexican legend the gods themselves sacrificed themselves to the sun to endue him with strength to do his work, and they handed on the duty to their human representatives, directing men to fight and kill each other to provide the sun with food.[4] Among the Guaranis of South America a sixteenth-century account describes the cannibal sacrifice of prisoners, who, with an exaggeration of cruelty, were given a wife previously, and if there was a child it was fattened and eaten.[5]

Finally, with the category of ideas to which cannibalism and human sacrifice belong we should connect the head-hunting raids especially common in the Malayo-Polynesian region. The carefully-preserved skull is at once a trophy and proof of valour, a memorial of vengeance, and a property of magic powers. Different aspects are specially prominent among different peoples. The Nagas of the Indian Hills, all of whom are head-hunters, are said to keep the skull to glut their vengeance.[6]

[1] Waitz, iii. 159.

[2] According to Torquemada. According to some other authorities, the practice was confined to certain tribes. (Waitz, iv. 264.)

[3] Payne, *History of the New World called America*, i. 470. Frazer, iii. 134 ff.

[4] Payne, i. 504.

[5] Letourneau, *La Femme*, 160, 161, 163.

[6] Godden, *J. A. I.*, xxvii. p. 15.

In Melanesia the idea of human sacrifice is prominent and we are closer to cannibalism. For at the funeral of a chief an expedition starts off to take heads in his honour, and any one with whom it falls in, not being of the chief's own people, serves the purpose. The object alleged, in one of the islands—Florida—for human sacrifice to the dead, is that "mana" is obtained—the mysterious power with which chiefs are endowed in life as well as after death, which they can transmit from the grave to those who then put themselves into communion with them. Further, in another Melanesian island—Ysabel—the human victim is eaten, and we have full-blown magical cannibalism; and to illustrate the affinity of ideas, we find that in Florida, where the victim is supposed only to be sacrificed, it is admitted that a little flesh is eaten.[1] But with these customs we are passing away from the special ethics of war into those of primitive religion generally. Head-hunting may be a purely private matter. It may be an incident in the making up of a blood feud, as among the Lampongs of Sumatra, where the murderer must appease his victim's family with two skulls and a victim to be buried at the grave.[2] It may be a matter of private vengeance or gain or glory, as among the Nagas, where men lurk about the water-ghat of a hostile village for the first woman or child that comes to draw water. Or it may be, as sometimes among the same people, the express object of an organized expedition.[3] In the former case it is at most an incident in the life of neighbouring hostile villages. Only in the latter is it the object of regular warfare.

A horrible feature of Naga head-hunting is that the skull of a woman or child, even a baby in arms, is prized as much as a man's. It is even thought a greater feat to obtain one, since it implies the boldness of penetrating into the heart of the enemy's country. This indiscriminate slaughter of women and children is frequent, but not universal, in savage and barbaric warfare.[4] Among these same Nagas in the feuds of clans as distinguished from the wars between tribes the women are sometimes spared. In the quarrels of the Luhuga killing is limited by agreement, and the women are not injured. It is a

[1] Codrington, *J. A. I.*, x. 308, 309. [2] Waitz, v. 149.
[3] Godden, *l. c.* [4] Godden, *op. cit.*, p. 13, quoting Sir J. Johnstone.

bright spot in the sombre picture of North American Indian warfare that women were respected. The reason was a magico-religious belief, in which it is open to us to find an ethical element, that unchastity would bring misfortune. The Dakotas, we are told, "generally treat female captives with respect. We hear of no violation of chastity on their war parties. During their absence the cause of their being chaste on their excursions, they say, is that they may not bring vengeance down upon their own heads, that is, displease the spirits of the deceased and the war medicine, as they would be made to suffer for their incontinency. They must keep themselves from women all the time they are out at war. Superstition has a controlling influence over them in this as in other respects."[1] Among the Hurons and in Virginia, though no quarter was given as a rule in the fight, women and children were generally made prisoners. The Winnebagos[2] say that they respect chastity in war at the bidding of the Great Spirit. The Iroquois did no violence to women captives, and Catlin states this as the general rule of the Indians that he knew. An exception are the Indians of Texas, who treated female captives with cruelty. But the general rule for women captives was adoption in a servile condition. Similarly in Oceania, it is stated that in the feuds of the little island of Rotuma women are respected, and that in the Carolinas and the Marshall and Gilbert Islands women prisoners are generally spared. At a higher level, among the Kabyles of North Africa we are told that women are respected in war, and even in an assault upon a village are not molested. Sometimes the women are so completely free from danger that they come and go without hindrance in the hostile territory, or look on calmly at the battle and perhaps in the end effect a reconciliation. This is the more intelligible when the fighting tribes are exogamous, so that the wife of a warrior on one side is sister or daughter of a champion on the other. In this capacity they act as reconcilers among the Kolarian tribes of Bengal.[3] Often, as among the Australians and the Papuans, they are employed as envoys and

[1] Prescott in Schoolcraft, iv. p. 63. The magical element in this conception comes out well in the point that among the Iroquois the war-chief was generally unmarried. (Waitz, iii. 158.) The general idea is clearly that women are taboo to fighting men as injuring their powers.

[2] See Schoolcraft—Drake, i. 188.

[3] Reclus, 295.

are inviolable.[1] But more often, though unmolested in the actual warfare, the fate which awaits them as prisoners is no enviable one. While the men are tortured, eaten, sacrificed or simply killed, the women and children are carried off as slaves.[2] This is one of the commonest methods of dealing with prisoners in the uncivilized world. A slightly higher level is reached when the male captives are allowed to share the fate of their wives and children.

For there comes a time in social development when the victor sees that a live prisoner is after all better than a dead one. Speaking generally, the custom of enslaving male prisoners does not arise until two conditions have been satisfied. On the one hand, a certain level of industrial organization must have been reached, making slave labour desirable; on the other, a certain warlike supremacy must have been attained by the slave-holding tribe which has familiarized it with the possession of captives, and so given scope for the habit of utilizing them to grow up. Perhaps a third negative condition may be added, that the vindictive passions must be sufficiently held in check to prevent their gratification in the moment of victory. It is thus not until the higher savagery, or perhaps the lower levels of barbarism, that we find slavery beginning to develop in any marked degree, and universally it has flourished more in races capable of permanent and steady labour than with those which are either hunters or fighters or nothing. It was impossible to create a large slave population among the North American Indians east of the Rockies, and we only find the practice of slave-holding among them in scattered instances. West of the Rockies, on the other hand, slavery is general.[3] In other parts

[1] Letourneau, *La Guerre*, p. 36.

[2] Among the North American Indians, while the males (unless adopted) were generally tortured and killed, women and children were more often taken captives, and adopted in a servile position. (Waitz, iii. 154, 156.) The enslavement of women in Black Africa is referred to below. Similarly at the other end of the old world, among the Ainus, the result of the frequent night-raids, whereby a quarrel between villages is avenged, is that nearly all the males are killed while the women and children are enslaved, the women often as concubines. (Batchelor, 288.) In this connection it must be remembered that in forty or more peoples practising marriage by capture as a full reality, the possession of a woman is the direct object of the war or raid.

[3] *E. g.* it is universal in Oregon. (Waitz, iii. 345.) Cf. Major Alvord in

of the savage world it is the ordinary alternative to the extermination of the vanquished. In Oceania the one method of treatment sometimes replaces the other. Thus among the Papuans war is the more savage and cannibalistic, where slavery is little practised.[1] Or the two methods may be combined, as in the Solomon Islands, where, in addition to war, a regular trade recruits the slave market, not only, however, for purposes of labour, but also for purposes of cannibalism and human sacrifice. Again, in Fiji the slaves are not worked hard, but are fattened for eating; and throughout Melanesia on the whole slavery rather subserves cannibalism than opposes it. In Polynesia human victims were generally chosen from prisoners of war and from slaves. In tropical South America prisoners may be put to death (and perhaps eaten), enslaved or adopted.[2] Throughout Black Africa the two institutions also coexist, the general rule being that where the men are killed and perhaps eaten, the women and children may be enslaved. Thus the Waganda slay all the men and enslave the women and children; the Masai kill all the men; the Wakuafi enslave them; the Bechuana take no prisoners.[3] On the whole, however, through savage and barbarian Africa, with the exception of the Kaffir tribes,[4] slavery is universal and strongly developed, and its principal source of recruitment is war. Throughout the Malay world the enslavement of captives is found as an alternative to cannibalism and head-hunting, while, again, in the tribes of the Asiatic Steppes the captives are often put to death, but slaves or serfs are numerous in proportion to the wealth and fighting power of the people who hold them.

Schoolcraft, v. 654, where an instance is given of a slave being sacrificed on his master's death.

[1] Letourneau, *L'Esclavage*, p. 35. According to the same authority (*La Guerre*, pp. 38, 39) head-hunting is common, and a woman's skull is as valuable as a man's. But women and girls are often spared in raids and taken for concubines. According to Kohler, *Z. f. vgl. Rechtswissenschaft*, 1900, p. 364, slavery and a slave-trade occur in certain parts, and slaves are sometimes eaten. Adoption, however, is another possible alternative to cannibalism in some parts of Oceania, *e.g.* in New Caledonia, where slavery is unknown. (Letourneau, *La Guerre*, p. 49.)

[2] Schmidt, *Z. f. V. R.*, 1898, p. 294.

[3] Post, *Afrik. Jurisprudenz*, i. 85.

[4] For very divergent accounts of the Kaffirs both as to treatment of prisoners and as to the extent to which they recognized slavery, see Waitz, ii. 398; Letourneau, *La Guerre*, 96, 97; *ib.*, *L'Esclavage*, p. 53.

We may briefly summarize these characteristics of savage and barbaric war by saying that it is waged, not merely by tribe against tribe, but by individuals against individuals. Its motive is often vengeance, the slaying of a man or the kidnapping of a woman, and whether it ends in the extermination or the enslavement of the beaten party, or even in the milder alternative of their adoption, it is equally directed against the individual persons who constitute the hostile community. The conquered in war stand with their persons and property wholly at the disposal of the victors. Their fate may be harsher or milder. They may be eaten, or sacrificed, or tortured, or simply slain where they stand; their lives may be spared, and they may be led into slavery. But in all these cases—and they form the overwhelming majority—they are treated as rightless and defenceless against those who conquer them. Even in the case where they are adopted as members of the conquering tribe, it can scarcely be said that their personal rights are taken into consideration.

4. In early civilization the character of war is not fundamentally changed in this respect. Only the growth of industry and of a settled order is a stimulus to the general enslavement of prisoners in preference to their destruction, while the development of military power increases the means of capture. Cannibalism generally dies out—the case of Mexico is an exception. Human sacrifice also occurs, but in the majority of instances, if the prisoners are not slain in pure vengeance, they are either carried off as slaves to the conqueror (and many of the great works of early civilization were built by slave labour of this kind) or a tribute is laid upon them, and they become a semi-servile population.

In ancient Egypt we find traces of cannibalism in the pyramidal inscriptions, but they are not specially connected with warfare. Something of the nature of human sacrifice, however, appears to have persisted to a late epoch. No bas relief is more familiar to the traveller in Egypt than that representing the king as a gigantic figure holding up a mace to smite the heads of a bunch of little captives, whom he holds with one hand, in the presence of a triad of gods. This scene,

found among some of the very earliest of Egyptian monuments, recurs in the Middle and New Kingdoms.[1] In some cases the bulk of the males were simply exterminated, but chiefs were selected, either for sacrifice or for special vengeance. Thothmes II. (18th Dynasty) records: "This army of his Majesty overthrew these foreigners. They took the life of every male according to all that his Majesty commanded, except that one of those children of the Prince of Kush was brought alive as a live prisoner with his household to his Majesty and placed under the foot of the good god."[2] Again, Amenhotep II. (18th Dynasty) narrates how "His Majesty returned in joy of heart to his father Amen. His hand had struck down the seven chiefs with his mace himself. . . . They were hung up by the feet on the front of the bark of his Majesty. . . . The six of these enemies were hung in front of the walls of Thebes, and the hands in the same manner."[3] The hands in this passage refer to the method of enumerating the slain. Of those who were killed the hands were cut off and sent to the king as a voucher for the number destroyed, and so the number of hands is a recognized expression for the number of slain warriors, and we have representations upon the monuments of heaps of hands of dead captives being brought in and piled before the triumphant king.

On the other hand, many of the Egyptian warlike expeditions were apparently mere slave *razzias*. Thus the officer Se'anch, who opened up Hammamat under the 11th Dynasty, records how he "repaired to the sea and hunted people and hunted cattle, and I came to this region with sixty full-grown people and seventy of their young children at a single time." Similarly, Usurtesen III. (12th Dynasty) commemorates his victory over the Nubians:

[1] Usurtesen (12th Dynasty) set up a stele commemorating his victories over the peoples beyond the Cataract. Ten of their principal chiefs had passed before Amon as prisoners, their arms tied behind their backs, and had been sacrificed at the foot of the altar by the sovereign himself. There are instances of human sacrifice as late as the Christian epoch. (Amélineau, *La Morale Egyptienne*. Introduction, p. 76.) Amru, the Mohammedan conqueror of Egypt, forbade a young girl being thrown into the river to get a good inundation. This, of course, is not connected directly with warfare, but as prisoners had been the principal source of sacrifice to the gods in earlier times, the persistence of the idea of human sacrifice throws an ill-omened light upon their lot, even in later days.

[2] Flinders Petrie, *History of Egypt*, 17*th* and 18*th Dynasties*, p. 73.

[3] *Ib.*, 156.

"I have carried off their women and captured their men, for I marched to their well. I slew their oxen, cut down their corn and set fire to it."[1]

The appropriate god, of course, took a part with zest in these proceedings. "The good god exults when he begins to fight; he is joyful when he is to cross the frontier, and is content when he sees blood; he cuts off the heads of his enemies, and an hour of fighting gives him more delight than a day of pleasure." So say the inscriptions of the 19th Dynasty. Mercilessness is idealized. Eulogizing the king, Sinuhit says: "He is a lion who strikes with the claw . . . he has a heart closed to pity; when he sees the multitudes he lets nothing remain behind him." And Sinuhit himself, in narrating a single combat with his foe, expresses with admirable terseness the primitive theory of retaliation: "I shot at him, and my arrow stuck in his neck. He cried out and fell upon his nose. I brought down upon him his own battle-axe. . . . Then I took his goods, I seized his cattle. What he had thought to do to me I did it unto him. I seized that which was in his tent; I spoiled his dwelling; I grew great thereby."[2]

Thus the rightlessness of the captured enemy was complete. The ideas of vengeance and retaliation were practically unmitigated, and no softening influence was exerted by religion. Upon the other hand, the idea of a regular treaty with a foreign nation was distinctly understood. Thus we have, in the reign of Rameses II., a treaty with the Cheta, providing for the return of deserters from either country to their original home, and promising that neither the deserter himself nor his wives or children shall be destroyed, nor his mother be slain.

In the sister civilization of the Euphrates and Tigris Valleys more is known of the warlike methods of the relatively barbarous Assyrians than of the relatively civilized Babylonians. Of the Babylonians our principal information comes from their treatment of the Jews, which included their arbitrary removal

[1] Cf. the complacent account in the inscription of Uni. (Sayce, *Records of the Past* (new series), vol. ii. p. 7.) Sometimes the captives became the spoil of the general himself. Aahmes, in the beginning of the 18th Dynasty, gratefully acknowledges his Majesty's goodness to him in this respect. Flinders Petrie, *op. cit.*, p. 22. Cf. Erman, 506.

[2] Sayce, *op. cit.*, vol. ii. p. 22.

from their own land into a species of captivity, of the conditions of which we know little, but, with the exception of the putting out of Zedekiah's eyes, we hardly hear of the personal tortures so savagely boasted of by one after another of the Assyrian kings. Towards the Babylonians the Assyrians themselves were mild in comparison with their treatment of other people; but the boasting of the Assyrian conquerors over the horrors perpetrated under their orders, though it appears in certain details to have been exaggerated by mistranslation, will probably always remain the classical exposition of naked and boastful ferocity in warfare. "To the city of Kinabu," says Assur-natsir-pal (B.C. 883–858), "I approached. . . . I captured it. Six hundred of their fighting men I slew with the sword, 3,000 of their captives I burned with fire. . . . The people of the country of Nirbu encouraged one another . . . the city of Tela was very strong . . . 3,000 of their fighting men I slew with the sword; their spoil, their goods, their oxen and their sheep I carried away; their numerous captives I burned with fire. I captured many of the soldiers alive with the hand. I cut off the hands and feet of some; I cut off the noses, the ears and the fingers of others; the eyes of the numerous soldiers I put out." Again, in another city, "I impaled 700 men upon stakes at the approach to their great gate. The city I overthrew, dug up and reduced to a mound and ruin. Their young men and their maidens I burned as a holocaust."[1] And so on through a list of mutilations, burnings and impalements.

Quarter, of course, was not always refused. Often the king narrates that the captives "took my feet. I laid hold upon them and counted them among the men of my own country." And it should be noted that, in the Assyrian Pantheon, there was at least one god who apparently made for righteousness and mercy. Asshur is always identified with the conquering king. He fights with Asshur, and wins victories for Asshur, but Shamash bestows his favours on the kings for righteousness, and it is at least worth noting that we find Tiglath Pileser setting captives free in Shamash's presence. The conquered might be carried off as slaves, or they might remain as tributaries, and the unwieldy and short-lived empires of the Near East consisted of such

[1] Sayce, *Records of the Past*, ii. 145, 159, etc.

tributary states, frequently rebelling, and reduced by great barbarity to submission and the payment of further tribute. Probably the increased number of slaves in later, as compared with earlier Babylonian times, may be ascribed to a long course of successful warfare.

5. The religious motive which, among the Assyrians and Egyptians, merely adds emphasis and a certain exaltation to warlike ferocity, became among the Hebrews a reason for carrying the savage practices of extermination to the extreme. We are perhaps hardly to assume that the primitive tribes who conquered Canaan were in reality so bloodthirsty as their historians represent them. The destruction, as commentators say, takes place on paper, but it is none the less ethically significant. The rules of war, as held by a strict Jahvist in the sixth century, are laid down in the twentieth chapter of Deuteronomy. A distinction is drawn between the cities which are far off and those of the Canaanites. In the former case the Hebrews were first to proclaim peace to the city to which they drew nigh, and "if it make thee answer of peace, and open unto thee, then it shall be that all the people that is found therein shall become tributary unto thee and shall serve thee." This is the milder fate. But if it makes war and the Lord deliver it "into thine hand, thou shalt smite every male thereof with the edge of the sword; but the women and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take for a prey unto thyself." This corresponds closely enough to what we have found to be the most common practice of barbarian warfare—tribute or forced labour from those who submit voluntarily, the massacre of the males and enslavement of women and children in other cases. A typical case is narrated, presumably as an example,[1] in Numbers, where all the male Midianites are slain, but the women and children are taken; but Moses is wroth with the host for saving all the women alive, on the ground that they cause Israel to trespass, and he bids them kill every male among the little ones and every woman, except the virgins, whom they may keep for themselves. Here the fear of religious contamination comes in, and

[1] Num. xxxi. 8, 9.

this is carried to an extreme in the case of the Canaanite cities with which we have now to deal. They were to be utterly destroyed. "Of the cities of these peoples which the Lord thy God giveth thee for an inheritance, thou shalt save alive nothing that breatheth." And so, in the conquest of Canaan, Jericho is "devoted," that is to say, it is made over absolutely to Jahveh; the city with everything belonging to it is sacred, and so taboo to man, and a curse is laid upon the site, so that it can never be built up again. When Achan secretes a wedge of gold taken from the spoil, he communicates the curse to the whole host, and the people suffer defeat until they remove from them the accursed thing. In point of fact this religious extermination was of course very incomplete, for the Canaanites remained, and we find Solomon[1] levying a tribute of bond service upon them. But there was much savage barbarity, whether from religious motives or merely from revenge. Joab smote every male in Edom,[2] and when he took Rabbah, "he brought forth the people that were therein, and put them under saws, and under harrows of iron, and under axes of iron, and made them pass through the brick-kiln,[3] and thus did he unto all the cities of the children of Ammon."[4]

Indiscriminate massacres were sometimes practised in the civil wars of the people, as in the case of the male Ephraimites who could not pronounce the famous shibboleth,[5] and of the Benjamites,[6] and the people of Jabesh-gilead who were destroyed, men, women and children, for not joining in the destruction of the Benjamites.[7] Only in two points does a higher ethical

[1] 1 Kings ix. 20, 21. [2] 1 Kings xi. 15.

[3] The Revised Version mercifully suggests a slight change in the text, which would run—"Made them labour at the brick mould." (2 Sam. xii. 31.)

[4] 1 Chronicles xx. 3. [5] Judges xii. 6. [6] Judges xx. and xxi.

[7] The whole story of Judges xx. and xxi. is complex and probably derived by putting different and incompatible versions together. It is intended to represent an execution of justice for a wicked act upon a tribe, but it incidentally reveals the barbarities mentioned in the text. It is to be observed, however, that the Israelites shrink from the utter destruction of a tribe, and so they preserve four hundred virgins from the people of Jabesh-gilead as wives for the surviving Benjamites, whose women had been destroyed, while they further encourage the Benjamites to carry off maidens from the feast at Shiloh to make up for deficiencies, an intermingling of crude barbarisms with an attempt at a moral which could hardly be surpassed for confusion.

conception emerge. First, there is the provision for a female captive in Deuteronomy, referred to in a previous chapter. She was to have her time for mourning, and, if married by her captor, was not to be sold nor dealt with as a slave, "because thou hast humbled her." Here there is a touch of humanity leavening general barbarism. Another point is the observance of the oath made to the children of Gibeon. They deceived Joshua into thinking they were strangers, but the covenant with them was to be observed to the letter, and so they became hewers of wood and drawers of water unto all the congregation. The oath, that is to say, was inviolable though taken in covenant with a foreigner and a heathen.

The spirit of retaliation and the taking of captives persists even in the exilic writer of Isaiah xiii. and xiv.: "They shall take them captive whose captives they were, and they shall rule over their oppressors."[1] Yet Micah is one of the first to dream of a universal peace. God "shall judge between many peoples, and shall reprove strong nations afar off, and they shall beat their swords into ploughshares and their spears into pruning-hooks; nation shall not lift up sword against nation, neither shall they learn war any more." With this passage, which is repeated in almost the same terms in the exilic "Isaiah," we find the religion of the Jews turning its face away from the fierce exclusiveness which led merely to an idealization of the most savage elements of warfare towards those hopes of a world-embracing religion, which was destined to so mighty a growth, though the fruits of universal peace have not yet been borne.

6. So far we have dealt with the essentially warlike peoples. As we go further east we come to that part of the human race in which the inherent preference of peace to war, professed by other peoples, appears to be more of a reality. Both in Hindu and in Chinese ethics, widely different as they are in other respects, war takes a lower place than in Western civilization. India, of course, had its heroic age. War is frequently mentioned in the Vedas. War chariots were used, and spears, swords, knives and defensive armour. Probably the Aryan invaders of India did not differ much in the rules of warfare from their

[1] Isaiah xiv. 2.

kindred in other parts of the world. In the Mahabharata we find the fighting spirit idealized. Chivalry is recognized, and honourable and dishonourable methods of warfare are distinguished.

"Red with rage, Bhima stepped up to the king-lion, who lay outstretched, with his club beside him, beat in his skull with his foot, and said: 'We have not laid fire to burn our enemies, nor cheated them in the game, nor outraged their wives; by the strength of our arms alone we destroy our enemies.'"[1]

The victors, however, carry off slave-women along with the booty; so that, though there might be rules of chivalry in the fight, the prisoners, as in barbaric warfare, were at the disposal of the conqueror. But not at his absolute disposal; quarter for the vanquished and general respect for women, though they appear to have been lawfully part of the spoil, are strongly insisted upon. Manu has, in fact, a complete, though brief, legal code of warfare.

When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. Let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says, "I am thine." Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight, nor one who is fighting with another (foe). Nor one whose weapons are broken, nor one afflicted (with sorrow), nor one who has been grievously wounded, nor one who is in fear, nor one who has turned to flight; (but in all these cases let him) remember the duty (of honourable warriors).[2]

This recognition of chivalrous usage and limitation of the use of barbarous methods may be associated with that general tendency of Indian thought which put the priestly caste above the warrior. Purity of life is the first object, and the spiritual law, involving as it does at its best careful abstinence from injury to every living creature, man or beast, becomes an ideal of life which, in the Brahmanic teaching, ranks above the old

[1] Duncker, *History of Antiquity*, vol. iv. p. 93.
[2] Manu, vii. sec. 90–93.

knightly ideal.[1] This ideal of peace and universal beneficence was further emphasized by Buddhism, to which the taking of human life under any conditions is a crime.

Passing still further east, we find that Chinese thinkers, so different from Indian in other respects, agree with them in their attitude to warfare. Yet Chinese warfare itself was, at any rate in early times, thoroughly barbaric. Few prisoners were made; the vanquished chiefs were put to death, while the common soldiers were released after an ear had been cut off. The left ears of the slain were also cut off, no doubt for purposes of reckoning.[2] Captives, however, were at times made slaves and were also tortured. We find allusions to both these practices in the classical books, *e.g.* in the *She-King*—

"With our prisoners for the question and our captive crowd we return."[3]

Again—

"My sorrowing heart is very sad,
I think of my unfortunate position.
The innocent people will all be reduced to servitude with me."[4]

And again—

"The engines of onfall and assault were gently applied
Against the walls of Ts'ung, high and great.
Captives for the question were brought in one after another.
The left ears (of the slain) were taken leisurely."[5]

The classical books, however, more than once represent the superiority of peaceful to warlike methods. The emperor or prince who gives an example of justice and graciousness is represented as attracting the people to him, and warlike chiefs are depicted as being influenced by an example of goodwill and readiness to give up a point. This is brought out very quaintly in such stories as those of the chiefs of Joo and Juy, who had a quarrel about a strip of territory, which they went to lay before

[1] Duncker, *op. cit.* 107.

[2] Biot, in the *Journal Asiatique*, translated in Legge's Prolegomena to the *She-King*, chap. 4, p. 158.

[3] *She-King*, Part II., Book i. Ode 8, Stanza 6. On this Dr. Legge notes: "Those who would be questioned" (put to the torture) "indicate, we may suppose, chiefs of the Heen-yun; the 'crowd of captives,' the multitude of their followers."

[4] Part II., Book iv. Ode 8, Stanza 3.

[5] Part III., Book i. Ode 7, Stanza 8. On this Dr. Legge notes: "When prisoners refused to submit, they were put to death and their left ears taken off."

the lord of Chow. But "as soon as they entered his territory, they saw the ploughers readily yielding the furrow, and travellers yielding the path, to one another;" and in fact every one giving way to every one else. All this made them ashamed of their own quarrel. They became reunited, and the affair being noised abroad, more than forty states tendered their submission to Chow.[1] But in this glorification of the virtues of an excellent passivity and of conquering by the meek surrender of claims, we come perilously near to a thin excuse for mere cowardice or failure. The reader must judge in which way the following story may be interpreted. When the Emperor Yu could not conquer the rebels of Meaou, he was admonished by Yih that "pride brings loss, and humility receives increase." Moved by the "excellent words," he drew off his army and "set about diffusing his accomplishments and virtue more widely." The better part of valour had its reward. "In seventy days the Prince of Meaou came to make his submission." One would like to know the precise nature of the "submission."[2]

In the teaching of Mencius, however, there is no doubt at all about the strenuous opposition to war and militarism. The protests of this great teacher against the use of force were repeated and strenuous. They were based upon the purest of humanitarian principles and applied with great psychological insight. When Mencius saw King Seuen much touched by the frightened appearance of an ox being led to the sacrifice and ordering that a sheep should be substituted for it, he told him very justly that it was because "you saw the oxen and had not seen the sheep." A superior man, he went on, cannot eat the animals whose dying cries he has heard, and so he keeps away from his cook-room. Mencius had thus grasped the fundamental fact of the part played by want of imagination in maintaining warfare. He proceeds to point out that here "is kindness sufficient to reach to animals, and no benefits are extended from it to the people."[3] The king should begin, he says, with reverence to age and kindness to youth in his own family, and the example would spread and tend to humanize the people.

[1] *She-King*, Vol. II., p. 441, note.
[2] *Shoo-King*, Part II., Book ii., iii., 21.
[3] Mencius, Book I., Part i. ch. 7, par. 8–10.

Instead of doing this the king prepares for war. Does this give him pleasure? The king admits that it does not, but says he does it to "seek for what I greatly desire." Mencius asks for what reason he desires it—for lack of food, clothing or sounds? No; it is for none of these. "You wish to enlarge your territories . . . to rule the middle kingdom and to attract to you the barbarous tribes that surround it, but to do what you do to seek for what you desire is like climbing a tree to seek for fish." In fact, it is worse, for it is calamitous. "Now, if your Majesty will institute a government whose action should all be benevolent, this would cause all the officers in the Empire to wish to stand in your Majesty's court, and the farmers all to wish to plough in your Majesty's fields, and the merchants both travelling and stationary, all to wish to store their goods in your Majesty's market-places . . . and all throughout the Empire who feel aggrieved by their rulers to wish to come and complain to your Majesty." In short, Mencius' prescription for making one's self a universal monarch was to prove one's self the best and most just monarch.[1] He would disallow the annexation of conquered territory except by the will of the conquered people. When King Seuen had conquered Yen, he asked Mencius if he should take possession of it. Mencius replied that, if the people of Yen would be pleased with his doing so, let him do it; otherwise not.[2] War itself Mencius denounces as a crime, and those who make war as worthy of death and worse. Confucius, he said, would have nothing to do with the ministers of oppressive princes; "how much more would he have rejected those who are vehement to fight for their prince. When contentions about territory are the ground on which they fight, they slaughter men until the fields are filled with them . . . this is what is called leading on the land to devour human flesh." Death, he says, is not enough for such a crime, and those who are skilful to fight should suffer the highest punishment. Again, "to employ an uninstructed people in war may be said to be destroying the people. . . . Though by a single battle you should subdue Tse and get possession of Nan-yan, the thing ought not to be done."[3] The mere transfer of territory is wrong, but the bloodshed by which

[1] Book I., Part i. ch. 7. [2] Book I., Part ii. ch. 10.
[3] Book IV., Part i. ch. 14; Book VI., Part ii. ch. 8.

it is achieved is worse. "If it were merely taking the place from the one state to give it to the other, a benevolent man would not do it; how much less will he do so when the end is to be sought by the slaughter of men."[1] As to ministers who advise a warlike policy with a view to conquest, they might be tolerated in these degenerate days, but in the good old times they would have been called robbers of the people. Mencius said: "Those who now-a-days serve their sovereigns, say, 'We can for our sovereign enlarge the limits of the cultivated ground and fill his treasuries and arsenals.' Such persons are now-a-days called 'Good Ministers,' but anciently they were called 'Robbers of the People.'"[2] The generals Mencius involved in one condemnation with the warlike ministers. "There are men who say, 'I am skilful at marshalling troops; I am skilful at conducting a battle.' They are great criminals."[3] The warlike Western world has scarcely known a more vigorous and sweeping protest against warfare and everything connected with it and every principle upon which it is based. And if it is said that the Chinese Empire, under the inspiration of such teaching, has ceased to be able adequately to defend itself against barbarians, it should also be remembered that, under the Chinese system, a population larger than that of Europe live in permanent peace with one another, and that they have, in a sense, as their own religious books recommend, absorbed those who have conquered them by peaceful arts.

7. From these ideals of peace we return to the fighting nations of the Western world. In Homeric Greece wars were often little more than raids for women and cattle lifting, or they were reprisals for similar raids by a hostile clan. Piracy was held to be improper and displeasing to the gods, but not shameful, and Thucydides remarks that to ask a stranger whether he was a pirate was apparently not considered an act of discourtesy.[4] In a captured town the normal fate of the men was to be slain, and of the women to be carried off as bond slaves. Achilles boasts of the pillage of which he has been guilty.[5] Quarter may be refused at will. Before the death of Patroclus Achilles

[1] *Ib.*, sec. 8.
[2] Book VI., Part ii. ch. 9.
[3] Book VII., Part ii. ch. 4.
[4] Thucyd., i. 5.
[5] *Iliad*, ix. 325, etc.

often accepted ransom, but after it he declares his intention of refusing all quarter and rejects Lycaon's prayers for his life. The corpse of the dead is insulted; Hector is dragged at the chariot wheels, and twelve youths are sacrificed to the spirit of Patroclus. Even in the historical period prisoners of war were unconditionally the property of the conqueror.[1] Custom enjoined quarter,[2] but prisoners were often killed.[3] Generally prisoners were held for exchange or ransom,[4] or sold as slaves. The booty was divided, and a tithe was given to the gods. In the case of the Medising cities the patriot Greeks took oath to devote a tithe of their goods to Delphi. But generally the terms obtained by a surrendered city depended upon the Homologia.[5] When a town was stormed all the males were often put to the sword and the women and children enslaved.[6] At the capture of Platæa the Spartans put all the prisoners to death after a judicial trial, and the Athenians were no better. On the suppression of the revolt of Chios all the men were slain and the women and children enslaved. The same fate befell Melos,[7] while at Mende the generals intervened to prevent the massacre.[8] At times the dead were mutilated,[9] and the same fate might even befall the living.[10] The massacres did not always go without a protest. In the famous case of Mitylene, the destruction of the entire city, after having been voted by the assembly, was rescinded by the redoubled efforts of the friends of the Mityleneans, who, by the aid of a specially swift trireme, overtook the first order in time to prevent its execution, so that only 1,000 Mityleneans were put to death.

On the other hand, the Greeks were perhaps the first people

[1] Busolt, *Handbuch der klassischen Altertumswissenschaft*, Bd. iv. p. 59. Aristotle, *Politics*, i. 2–6, 1255a.

[2] Thucyd., iii. 58, 66, 67. The surrendered Platæans plead that "the custom of Hellas does not allow the suppliant to be put to death." The plea, however, was not allowed.

[3] Thucyd., i. 30; ii. 67; iii. 32. Xenophon, *Hellenics*, II., i. 32. Plutarch, *Lysander* (tr. Langhorne), p. 311.

[4] Thucyd., ii. 103; iv. 69; v. 3. Herodt., i. 89.

[5] In the case of Potidæa, the men were allowed to leave the city with one garment, the women with two. The Athenians blamed the general for concluding the agreement instead of forcing a surrender at discretion. (Thucyd., ii. 70.)

[6] *Iliad*, ix. 590. Thucyd., iii. 28; v. 3, 32, 116.

[7] Thucyd., v. 116.

[8] Thucyd. iv. 130.

[9] Xenophon, *Anabasis*, iii. 4.

[10] Xenophon, *Hellenics*, ii. 1.

to develop something like a regular international law. Feuds between neighbours were replaced by *spondae*, which passed ultimately into alliances, generally of a defensive character, and for a specified number of years.[1] But further than this, they developed a regular system of arbitration. Periander of Corinth arbitrated between Athens and Mitylene as to the possession of Sigeum. In the sixth century Sparta arbitrated between Athens and Megara, and appeals to Delphi were not uncommon.[2] Sometimes states were pledged by oath or by the deposit of a sum of money to abide by arbitration, but in other cases the loyal acceptance of the decision was a matter of goodwill, and was sometimes refused, as in the case of Thebes[3] and of Elis.[4]

Furthermore, the instances of severity quoted above represent the darkest side of Greek warfare. There was a better spirit at work which recognized certain common laws of the Hellenes, "unwritten laws" prescribing a measure of justice in inter-state dealings, and of moderation and humanity to the vanquished. The conquered Platæans appeal, though they appeal in vain, to the custom of Hellas, which does not allow suppliants to be put to death.[5] The dealings of the Athenians with Melos are scathingly exposed by Thucydides by the absolute contempt of right which he puts into the mouths of the apologists for Athens, and the incident is dramatically set immediately before the narrative of the Syracusan expedition, in which the impieties of Athenian aggression were heavily punished. Mr. Murray considers that the same incident was the immediate occasion of Euripides' moving representation of the sufferings of the "Trojan Women" played in the following year. Further, the whole principle of Greek warfare was challenged by the philosophers. The enslavement of Greek prisoners, the stripping of the slain, the erection of trophies in temples, the ravaging of the land (apart from carrying off the crop of the season) and the burning of houses are all condemned by Plato. The refusal of quarter is not explicitly mentioned, from which we may infer that at least as a matter of principle this was sufficiently recognized as a wrong in the fourth century. On the other hand, this milder practice is only insisted on in wars

[1] Busolt, *op. cit.*, p. 54. [2] Thucyd. i. 28. [3] Herodt., vi. 108.
[4] Thucyd., v. 31. [5] Thucyd., iii. 58.

between Greek and Greek. These should be conducted as civil strife is at present, that is to say, with the mitigations specified, while in future, Greeks should behave to barbarians as they now do to one another.[1] Nor was Plato alone in his attitude. Aristotle, while recording that the law "is an agreement wherein they say that what is conquered in war is the property of the conqueror," records that many jurists bring a charge as it were of illegality against this law, and both jurists and philosophers are divided on the point.[2] Aristotle himself points out that the origin of a war may not be just, and "no one would say that he is a slave who does not deserve to be a slave, for if so those who are held noblest might be slaves and sons of slaves if they happened to be captured and sold." The truth is that the Greeks "do not mean to call themselves slaves, but the barbarians." The solution is that there are natural slaves, who are slaves everywhere. In other words, the barbarian is ordained by nature as slave to the Hellene, but the Hellenes should be free.[3] In this argument Aristotle clearly conceives himself to be merely stating explicitly and consistently the principle which is confusedly held in the uninstructed thought of the period. He thus represents the stage which the best Greek ethics really attained in this direction—an acceptance of a higher rule of warfare enjoining respect for the persons of the conquered (Plato's argument would add for their property as well) within the limits of Hellas.[4] Outside these limits the old rules of barbaric warfare persist unaltered.

At Rome a defeated enemy was in principle rightless. The very type and exemplar of property is that which is captured from an enemy. Stranger and enemy are identical terms. The stranger can have no rights except through the protection of a citizen, and even apart from war and hostility it is a juristic

[1] Observe, however, that this summary of the argument is put into the mouth of Glaucon, not of Socrates. Possibly Plato would have been willing to preach a more comprehensive humanity, but feared to push the argument too far. (*Republic*, v. 469–471.)

[2] *τοῦτο δὴ τὸ δίκαιον πολλοὶ τῶν ἐν τοῖς νόμοις ὥσπερ ῥήτορα γράφονται παρανόμων . . . . . καὶ τοῖς μὲν οὕτω δοκεῖ τοῖς δ' ἐκείνως, καὶ τῶν σοφῶν.* Aristotle, *Politics*, i., vi. 2.

[3] *Ib.*, pars. 4–6.

[4] The principle found practical expression in the oath of the Delphian Amphictyony not to destroy any allied state, nor to cut off its water in war or peace. (Busolt, p. 65.)

maxim that a member of a foreign community not bound to Rome by any treaty might be lawfully enslaved; in other words, all legal rights are confined to citizens and those to whom their protection is extended, and the alien, and therefore still more the captured foeman, is at the disposal of the conqueror. In point of fact the conquered were often put to death in great numbers, for example, the population of Vacca by Metellus in the Jugurthine war.[1] The same fate befell many towns of Gaul under the comparatively clement Julius Cæsar. The taking of Ilurgis in Spain was succeeded by a general massacre in which neither women nor children were spared.[2] Tacitus, describing the ravaging of the Marsi by Germanicus, says that neither sex nor age were grounds of mercy.[3] The good Emperor Titus massacred or sold as slaves all the captives at the taking of Jerusalem.[4]

But these are extreme cases. There is no reason to doubt that the general feeling of the Roman world condemned excesses of barbarity. Livy makes Camillus say that his soldiers direct their arms not against that age which is spared even in the capture of a town, but against armed men.[5] The slaughter of non-combatants, old men, women and children, is frequently spoken of in terms of condemnation, even of horror,[6] and Livy's words, "jure belli in armatos repugnantesque caedes,"[7] imply the full limitation of the right of killing to active combatants as understood in modern warfare. The violation of women, if frequently allowed, was as frequently condemned, and measures were by some generals taken to prevent it.[8] Upon the whole, personal barbarity, indiscriminate massacre, the refusal of

[1] Letourneau, *La Guerre*, p. 466.

[2] Grotius, iii., 4, 9, quoting Appian.

[3] Grotius, iii., ch. iv. section 9, and authorities there cited, especially the cynical remark of Horace which sums up the whole matter, "Vendere cum possis captivum occidere noli." (Ep. xvi. 69.)

[4] Letourneau, *La Guerre*, p. 467, quoting Josephus, *Bell. Jud.*, Book vi. ch. xlv.

[5] Livy, v. 27, and other passages quoted in Grotius, iii. 11.

[6] Instances, Greek and Latin, in Grotius, *l. c.*

[7] Livy, xxviii. 23. Grotius, *ib.* Grotius further cites Sallust, *Jugurthine War*, ch. 96, for a condemnation of the slaughter of men after surrender as *contra jus belli.* Elsewhere, par. 6, he quotes Cicero as saying that captives who have not shown cruelty should be spared, and Seneca as insisting that an enemy should be set free, and even held in honour, if he has fought for honourable reasons.

[8] *E. g.* Marcellus and Scipio. Grotius, Book iii., ch. iv. par. 19.

quarter, the violation of women, and the slaying of captives, though practised in times of excitement or loose discipline, are condemned by the better minds as contrary to the *jus belli*.[1] On the other hand, the enslavement of prisoners, if desired, and the confiscation of property were admitted to be regular.[2]

The importation of slaves into Italy on a large scale, owing to war and the slave trade, revolutionized the Roman economic system, and led thereby to the fall of the Republic. But, instead of being enslaved, the conquered people might become tributary—*dediticii*. The formula in this case expresses the absoluteness of surrender exacted by an ancient conqueror: "I give my person, my town, my land, the water which runs there, my boundary gods, my temples, my movables, all the things which belong to the gods, to the Roman people."[3] The people who surrendered on these terms retained their lands on payment of tribute and accepted a Roman governor. They had in strictness no rights as against the Roman Government, and whatever liberties were accorded to them were reversible at will.[4] But a more liberal system grew up as the Roman conquests were extended. In some cases a community was allowed to retain its own government while brought under the political hegemony of Rome as an ally, with rights secured by foedus. A considerable measure of local self-government was left to the civilized communities fully incorporated in the Empire, and the spread of Roman civilization was regularly marked by the extension of municipal privileges. Further, civic rights were extended to the subjects of Rome, first in the form of the *jus Latinum*, which from early days had conferred the principal civil rights on inhabitants of the cities of Latium, and finally, as civilized order advanced, of the full Roman franchise, which, though its political value disappeared with the fall of the Republic,

[1] An exception must be admitted in the case of the vanquished king or general, who might be, and not infrequently was, put to death in the Mamertine prison before the sacrifice to Capitoline Jupiter was proceeded with. (Grotius, iii., 11, 1.)

[2] See Livy, cited in Grotius, iii., 5, 1: "Esse quaedam belli jura quae ut facere ita pati sit fas: sata exuri, dirui tecta: praedas hominum pecorumque agi."

[3] Letourneau, p. 468.

[4] Mommsen, *Hist. of Rome*, Book iv. ch. 7.

placed subjects and masters on equal terms before the law. The boast of Virgil that Rome spared the submissive and warred down the proud was not wholly without justification, and the Roman Empire gradually approached the ideal of a world state, in which distinctions of nationality carried no difference of privilege, but citizenship was extended to all free men. There was in this a certain approach to universalism which might hold within it some promise, if not of an abolition of war, at any rate of a reconstitution of its character.

8. We have now to consider the bearing of universalism, as represented by the world religions, upon the moralities of war. In the teaching of the Koran it appears to be assumed that true believers will live at peace, while they will conquer and subdue the unbeliever. "If the two parties of believers quarrel, then make peace between them; and if one of the twain outrages the other, then fight the party that has committed the outrage until it return to God's bidding; and if it do return, then make peace between them with equity and be just. Verily God loves the just. The believers are but brothers, so make peace between your two brethren and fear God, haply ye may obtain mercy."[1] No Moslem captive might be enslaved.[2] Very different was the attitude to unbelievers. "And when ye meet those who misbelieve, then striking off heads until ye have massacred them, and bind fast the bonds." Theoretically, in fact, there is perpetual war with all countries which have not embraced Islam. But there are degrees. No compromise was possible with Arabian idolaters or with apostates. Non-Arabian idolaters might be reduced to slavery, and, generally speaking, captives might be slain, since the Prophet did so, and slaying them terminates wickedness, but if a captive became a Moslem on the battlefield, he might not be put to death, but in this case he might still be enslaved, as the reason for enslaving him, that is to say, securing his person, came into operation before the change of faith. Slavery, then, was the second alternative, and beyond this there was the milder possibility that the captive might be released as a *Zimmi*, that is to say, as a non-Moslem

[1] Koran, *Sacred Books of the East*, vol. ix., chap. 49.
[2] Grotius, iii., 7, ix., 2.

subject, liable to tribute. In any case a woman was not to be slain in war. Mohammedan teaching, then, rests on the distinction between Moslem and non-Moslem. Within the Moslem world it looks forward to universal peace and forbids the enslavement of the captive. Outside that world it allows not only enslavement, but the refusal of quarter.

The character and effects of Christian teaching are somewhat complex. While the Gospels pronounced definitely against violence in any shape or form, the Church accommodated her teaching to the practice of a warlike age, and Augustine upholds the soldier's profession, and endeavours to lay down the conditions upon which war is justified. "To wage war is not a crime, but to wage war for the sake of booty."[1] There is no moral distinction between open fighting and ambuscade in a just war, "but just wars are commonly defined as those which avenge injuries, if any race or state which is to be attacked in war has either neglected to punish wrongs done by its own citizens or to retrieve what has been wrongfully carried off."[2] Again, the kind of war ordained by God is just. Ambrose, strongly denouncing the principle of non-resistance, declares that he who does not defend a friend is as bad as the aggressor.[3] On the other hand, malice, cruelty and vengeance, the implacable spirit, savagery in insurrection (*feritas rebellandi*) and the lust of dominion are condemned by Augustine.[4] The purport of these distinctions, for what they are worth, is to condemn aggression and restrict warfare to the defensive. Private warfare, moreover, was persistently combated by the Church,[5] and with regard to the rules of warfare generally, the canons dealing with the treatment of the enemy in person or property mark a distinct advance in European custom. To enslave a fellow-Christian or to put him to death, except in the actual fighting, was forbidden from an early date,[6] and Augustine lays down,

[1] Serm. xix. Quoted by Gratian, *Corpus Juris*, 893, but apparently of doubtful authenticity.

[2] *Corpus Juris*, 894. Reading "si qua gens vel civitas quae bello petenda est."

[3] *Ib.*, 898.

[4] Contra Manichaeos, *Corpus Juris*, 892.

[5] According to Westermarck, however, with comparatively little success. (*Moral Ideas*, p. 356, seq.).

[6] Grotius, *loc. cit.*, quoting Gregoras, who lays it down as a rule holding among Christians, δια τὴν τῆς πίστεως ταὐτοτήτα, recognized not only among

though not in very forcible language, the broad principle of later warfare, that the slaughter of the enemy is to be limited by necessity (*hostem pugnantem necessitas deprimat non voluntas*).[1] From this it follows that the lives of non-combatants, as well as captives, should be spared. Women and children are therefore secured from violence. Priests naturally enjoyed the same privilege, and it was extended by the Canon Law to husbandmen and tradesmen.[2] Even as to the practice of ransom, which grew up when quarter came to be allowed, the Canon Law had its doubts, to be overcome by a lawyer's quibble. "A captive's goods are unjustly extorted from him, but are justly proffered to redeem his life," is the solution proposed by Gratian;[3] a solution which in practice justifies ransom, and in theory must be taken to admit that the captive's life is forfeit.

How far these relatively enlightened principles were from restraining the barbarity of the Middle Ages every one knows. From the decline of the Western Empire to the Peace of Westphalia the internal wars of Western Europe present a series of barbarities and horrors which fully equal those of the Greek or the Italian peoples, and Grotius in his search for instances of magnanimity, generosity and the reprobation of methods of savagery more often quotes Greek or Roman generals than those of the Middle Ages or of his own time. Yet the idea of chivalry—the cult of the very *parfait gentil* knight, sworn to succour the oppressed, to defend women and children, and to avoid all unknightly deeds—is a true product of the Middle Ages, and its appearance side by side with the barbarities of actual warfare is characteristic of the period. In the generations before Grotius' own time and during his life the savagery

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Romans and Thessalonians, but among Illyrians, Triballi, and Bulgarians, *τὰ μὲν πράγματα μόνα σκυλεύειν τὰ δὲ σώματα μὴ ἀνδραποδίζεσθαι, μηδὲ φονεύειν ἔξω τῆς πολεμικῆς παρατάξεως μηδένα.*

[1] Augustine, Ep. 207. *C. J.*, 892.

[2] Grotius, iii., 11, 12. Hall (*A Treatise on International Law*, p. 397) refers to the Canon de Treuga (*Decret. Greg.*, p. 203, lib. i., Tit. xxxiv. cap. 2), which laid down that monks, merchants, husbandmen and their animals, travellers, etc., are not to be killed. Hall also cites Franciscus à Victoria as maintaining "quod etiam in bello contra Turcos non licet interficere infantes. Imo nec feminas inter infideles." The tradition lingered long that a garrison which held out *à l'outrance* might lawfully be massacred. This is discussed by Grotius iii., 11, 16, etc. See Hall, 400.

[3] Grat., *Corpus Juris*, 896.

of warfare had gathered itself for a supreme effort, and under the guiding genius of an Alva and a Tilly had shown what men could do to one another. But with the Peace of Westphalia the period of the religious wars came to an end. Men were sickened with horrors, and were the more ready to listen to those who, like Grotius, had a rule to propound whereby even in war men might be saved from becoming fiends. The devastation of the Palatinate, which half-a-century earlier would have passed unnoticed as an ordinary incident of war, coming in 1689, caused a thrill of horror in Europe, and from that time onwards the practice of war underwent a slow and insufficient, but still a real amendment.

9. The principle to which Grotius appealed was the Law of Nature, which, however fictitious in the form in which it was conceived by him and his contemporaries, expressed the profound ethical truth that the rights and duties of men are not circumscribed by the limitations of positive law or of revelation, but rest upon certain universal attributes of humanity. But this principle was pregnant with great consequences. By resting rights and duties on human nature as such, it gets below the distinction of compatriot and foreigner and destroys the basis of group-morality. Once grant that an enemy does not cease to be a man, to whom as a man certain primary duties are owing, and we have a principle which undermines the whole structure of the earlier ethics of warfare. As a human being possessed of human rights, the enemy comes under the ordinary civilized conceptions of justice. He cannot fairly be punished for the delinquencies of his nation. Grant, what every belligerent assumes, that his own cause is just and that of the opponent indefensible, grant that this is proved to the full satisfaction of the military conscience by the verdict of the god of battles, still it is only the hostile government that is in fault. The citizen of the conquered country, even the soldier of the beaten army, is not in fault. He has merely done his duty as a patriot, and to make him suffer either in person or property for the delinquencies of his government would be to apply the barbaric principle of collective responsibility. That suffering will fall on individuals is certain. Modern ethics have done little

to mitigate the methods allowable in the pursuit of victory. Soldiers may be slain in any number and by all methods except the few barred by the Geneva Convention and the Hague Conference. Civilians, men, women and children may be shut up in fortified towns and starved into surrender at whatever cost of suffering and of life. Property may be requisitioned at the discretion of the invader. But all these things are done to increase the chances of victory, and except with this object no infliction of death or suffering, no pillage or destruction of property is lawful. On the contrary, the victor owes as much consideration to the vanquished as to his own side. The captive wounded must be cared for, prisoners must be suitably maintained. At the close of a war, even if territory is annexed, there should be no confiscation of property or loss of personal rights. Some thinkers sum the matter up in the formula that civilized war is "a relation of a state to a state, not of an individual to an individual," and if this is rejected by good authorities[1] as carrying legal consequences, which they are unwilling to admit, it may be accepted in ethics as practically defining the modern attitude. War must be undertaken and carried on by an organized government. It must be waged, if not by regular troops, at least by combatants authorized in a regular manner. Non-combatants must be respected in person and, so far as military exigencies permit, in property. On their side, they must abstain from warlike acts, and failing to do so render themselves liable to military execution. The killing of an enemy except in the course of a regular military operation is murder. A sharp line is drawn between hostile acts done in accordance with law and under orders and those done irregularly. The latter are subject to punishment if the offender is caught. Thus, if not technically accurate, the view that war is a state of hostility between organized governments rather than between individuals expresses an important measure of truth.[2]

[1] Hall, p. 64.

[2] I speak in the text of civilized war. In fighting savages, the white man deliberately lowers himself to the savage level. The burning of kraals, for example, has been distinctly justified on the ground of reciprocal usage, and the refusal of quarter almost as openly. Further, when a savage enemy is overthrown, the white man not seldom enters upon his

10. In emancipating individual rights from the violence of war, the international lawyers were merely applying the conception of the rights of the individual personality on which modern ethics rest. The further question remained, whether the various groups of mankind have as groups assignable rights. Has a state rights as against other states? Has a nationality which has no independent government a right as against the state or empire of which it forms a part? Has a locality rights as against the country within which it lies? Confining ourselves for the present to the first question, we may point out that the utter denial of all obligations as between communities under separate governments has seldom if ever been consistently carried out. Even savages recognize the obligations of good faith, and the wickedness of breaking a covenant when once made. On the other hand, the right of the stronger to impose what terms he pleases, and if necessary to push his demands to the point of the utter annihilation of his enemy as an independent power, has been almost as generally admitted. Yet in its denial of international justice the world has always been singularly halting. The fable of the wolf and the lamb has always applied to the dealings of strong and weak peoples, and men are never content to destroy their enemies without first proving them to be wholly in the wrong and utterly unworthy to live. In our own day the confusion of ideas has reached its height, and results in changes of attitude which succeed one another with bewildering rapidity, men who at one moment deny all pleas for international justice as silly sentimentality firing up immediately afterwards when they are accused of applying their own principles with perfect consistency, and denying as a disgraceful slander the charge that they have followed practices which they have always declared to be justifiable. From these symptoms we may conclude that the human conscience is uneasy when it is finding formulæ to sanction wrong-doing

territory and cattle, sometimes also reducing him to partial slavery. Further, even as between whites, the rules of warfare are too frequently honoured in the breach. They are kept at the outset, and as long as both armies are well in hand, but in the absence of an impartial tribunal to enforce them, they become relaxed, and each side charges the other with breaches of them, and considers the charge a sufficient excuse for a further breach on its own part. The text describes civilized war at its best.

in international affairs, and that in the back of their minds people recognize that justice is justice even though there be no power to enforce it.

In the mediæval world such a power was in fact found in the spiritual supremacy of the Pope, which accustomed men to the reconciliation of national independence with a spiritual authority to whom all alike could appeal. When the Reformation broke up this unity and the discovery of America raised new problems of international right and wrong, the modern idea of an international code soon emerges. The early writers, like Franciscus à Victoria, who boldly challenged the whole position of the Spanish in the Indies, were too far ahead of their generation, and passed away without sensibly influencing it. The work of Grotius, as we have seen, had a more enduring influence, and that not only on the usages of war, but on the whole conception of nations as being at once politically independent and yet morally subject to the Law of Nature. A more revolutionary principle was introduced, or rather was brought into prominence, by the Society of Friends, who denounced all warfare as contrary to the teaching of Christ, and sought to recall men to the principle of non-resistance. The influence of the Society on the modern world is not to be measured by the number of converts to its principles. It is a protest which has set the military spirit the task of justifying itself. Such justification may be founded in theory on the necessities of self-defence. But if self-defence is a fully sufficient justification when the genuine motive of resistance, the study of history compels us to recognize that it is too often a mere cloak for aggression. Nor if people are in earnest in the desire to restrict war to the occasions on which a nation can maintain its plain rights by no other means, will they question that war is a radically rude and barbarous method of attaining that end, justifiable at best only until means of obtaining justice in international affairs are devised by the common-sense of civilized humanity. The repeated settlement of difficulties —sometimes of a most anxious and irritating nature—by arbitration in recent years, the instances of general agreements settling outstanding controversies and providing for arbitration on future matters of disagreement, and finally the provision of

a standing machinery for such occasions, all point to a partial replacement of war by arbitration, and there seems every reason to hope that within a generation the employment of judicial arbitrament will be as common among the European states as it was in the fifth century B.C. between the states of Greece.

The doctrine of natural liberty, particularly as preached by Cobden and the Free Traders, also told heavily on the side of peace, just as the recrudescence of militarism in our own day has been associated, not in this country alone, with economic Protection. But the Cobdenite doctrine was negative, and might even, if rigidly applied in cases like that of the Armenians, be made a justification for a cynical policy of national isolation. More elastic and more human was the Gladstonian creed, which, following in the tradition of Fox, and equally of Canning, utterly broke with the doctrine of state morality and rested international dealings on the simple ground of right and wrong as applicable to all other human relations. This is the Grotian principle, but more thoroughly carried out. For Grotius, holding that states were bound by the Law of Nature, conceived their conduct as restricted only in those directions—and they were not so many—with which the Law of Nature dealt. The fuller view allows of no fundamental difference between one branch of morality and another. One is as "natural" as the other, and so the conception that we form of the honour, the true interest, the advancement of our country is to be measured by the same standards as we apply in judging of what redounds to the honour, the true interest, the advancement of our dearest friends. At this point we reach the result to which Mazzini was led by one road and Comte by another, of each nation as a member of the family of nations which constitute humanity, as possessing duties as well as rights in virtue of its position, and as deriving a higher honour and more lasting glory from its services to the greater whole of which it is a part than from any exhibition of superior strength shown in rivalry with its fellow-members. Just as international law rests in its beginnings on the conception of humanity as incarnate in the person of every human being, so in the consummated conception of right and brotherhood between nations, it touches the other pole of

modern ethics—the conception of humanity as a whole, the sum of all human beings and their collective history. In this conception the old group-morality disappears. The special relations of citizenship impose special obligations, but they are no longer incompatible with the wider obligations to humanity at large, but supplement them. The Englishman owes a duty to England—the mother of freedom, the land of his fathers, the state which protects him, the nation which stimulates and guides him with a glorious tradition, which it is his most splendid ambition to carry further on its true line of growth. He does not owe the same duties to France or Germany, but he owes them recognition as members of the family of nations, and there are times when he can best serve England by reminding her of what is due to them. The true patriotism is the corner-stone of true internationalism.

In all this it is true that we are describing the ideals of thinkers and statesmen rather than the practice of nations. Still, that such ideals should have come into touch with practical statesmanship, as in the course of the nineteenth century they undoubtedly did, is itself a fact of the highest importance for ethical history. And notwithstanding a certain counter movement in more recent thought the actual realization of internationalism contrives on the whole to move forward. The development may be compared to the rise of justice within society. The civilized world has passed through the age of the blood feud in which any quarrel gave rise to a war of extermination. Custom has long since restricted the quarrel, excluded non-combatants from the ring, and prohibited the general massacre or enslavement of the kinsfolk. But, as in many primitive societies, there is no physical force behind these customs, there is nothing but the pressure of opinion and the ethical and religious ideas shared by the nations concerned in common with its neighbours. The next stage is to institute a court for the settlement of disputes. Such a court generally has no powers in early society except the moral power of an appeal to opinion, and precisely this is the position of the Hague tribunal. It is not difficult to imagine a time when the decisions of that tribunal shall have gained such authority that to dispute them will be held at once an outrage on justice and a menace

to the world's peace—such a menace as would provoke a combination of powers to coerce the recalcitrant party. At that point the world's tribunal will have gained the executive authority needed to transform it into a fully-developed court of justice.

CHAPTER VII

CLASS RELATIONS

1. We have seen that morality at its outset is bound up with the structure of the social group. Between members of any one community the obligations recognized may be many and stringent, while in relation to outsiders no obligations are recognized at all. The typical primitive community is, as it were, a little island of friends amid a sea of strangers and enemies. The consequences of the group principle we have traced in the history of warfare. We have seen it applied in its extreme form in the treatment of conquered enemies as men destitute of any title to consideration; we have seen that as moral development proceeds, it is moderated and softened, but that, except in the highest ethical thought, it does not wholly disappear. Throughout history we have the standing contrast of the comparative peace, order and co-operation within each organized society, and the disunion constantly tending to hostility found in the relations of different societies to one another. We have now to trace the operation of the same principle upon the structure of society itself.

The primitive community is, as a rule, small, but compact and homogeneous. There is always the distinction between its own members and outsiders; there is also a greater or less distinction in the rights enjoyed by the two sexes. In other respects the obligations constituting its ethical life are fairly uniform. But as society grows and its industrial life develops, as primitive barbarism gives way to some degree of culture, this simplicity of the early social organization breaks up, and now the group principle obtains a fresh development. Distinct groups arise

within each society, within the limits of a single community, under one king or one governing body. Besides the group of free men—to use that term provisionally—who constitute the members of the community in the fullest sense of the word, there arise inferior classes, slaves or serfs or low-caste men who are in the community and yet not of it, who are subject to its laws and customs, but not possessed of all the civil rights which membership confers. These inferior groups within the community occupy a position which is morally and legally analogous to that of strangers and enemies. In extreme cases they are wholly devoid of rights, in other cases their inferiority is marked by a more or less serious lack of the civil rights enjoyed by their superiors. Historically, in the case of slaves, their position is, in point of fact, very largely that of incorporated enemies, and whether this corresponds to the historical fact or not, ethically speaking, the denial of personal rights from which they suffer is a consequence of that same group-morality which from the first contrasts friend and neighbour with stranger and enemy, and denies to the one the elementary rights of a human being, which are readily accorded to the other.

Not merely political privileges, but civil rights, the right of holding property, the right of personal freedom, the right of marriage, even the right of protection of life or limb, are wholly or in part denied to classes excluded from full membership of the community. Such distinctions of personal status are found in one form or another in the great mass of societies, civilized or uncivilized, which stand above the lowest stages of culture. They persist well into the modern period, and are but slowly modified, and partially abrogated in proportion as the whole principle of group-morality yields to ethical criticism. Of these distinctions the commonest is, of course, the distinction between slave and free, but slavery is in many cases replaced by serfdom and in others by caste. What is common to all three institutions is the derogation from full rights which they imply. In detail they are distinct, though the line of demarcation is not always easy to draw. We may say that the slave, properly regarded, is a man whom law and custom regard as the property of another. In extreme cases he is wholly without rights, a pure chattel; in other cases he may be protected in certain

respects, but so may an ox or an ass. As long as he is for all ordinary purposes completely at his master's disposal, rendering to his master the fruits of his work, performing his work under orders, rewarded at his master's discretion, and liable to punishment on his master's judgment, he may, though protected in other relations, fairly be called a slave. If, on the other hand, he acquires a certain position of his own, obtains property from which he cannot be dislodged except for some default, enjoys the right of marriage and protection for life and limb, he becomes, though still liable to labour under his master's direction, still subject, perhaps, to punishment and still in an inferior legal position, no longer a slave, strictly so called, but a serf. Serf and slave alike belong as a rule to private masters. A servile caste, on the other hand, is not necessarily in the ownership of any man or body of men. It is distinguished by a greater or less lack of personal rights, by social inferiority, and probably by a taboo cutting it off from intercourse with others. And as there may be servile castes falling below the normal level of free men, so there may be privileged castes of nobles possessing, as it were, an excess of rights, and these privileges may indirectly depress the position of the ordinary member of society and impair his freedom by withholding protection from him in relation to one of the nobility. Finally, the whole community may suffer a similar depression in relation to the king, who, in the extreme development of the despotic principle, becomes, as we have seen, eminent owner of all property and lord of the persons of his subjects. In such cases, though there may still be distinct grades in society, yet all subjects alike are in principle destitute of rights.

Now all these methods of the gradation of rights, if the phrase be allowed, rest ultimately on the principle of group-morality—the principle that rights and duties do not attach to the human being as such, but are determined by extraneous considerations, social, political, or religious. The development which this principle attains varies very greatly in different societies, and depends upon economic and social, as well as on ethical and religious conditions; but its operation in one form or another persists throughout history, and is one of the dominant facts, if not *the* dominant fact, ethically considered, in the evolution of human

society. In tracing its varied development, we shall for the most part follow the history of slavery and serfdom as the main line along which it runs. We shall, however, deal with other forms which the principle assumes, as occasion requires.

2. In the primitive group, as has been said, we find, as a rule, no distinction of slave and free, no serfdom, no caste, and little, if any, distinction between chief and follower. Taking this statement alone, one might infer that the primitive savage realizes the ideal of the philosopher of a community of free men and equals; but the savage enjoys freedom and equality, not because he has realized the value of those conceptions, but because neither he nor his fellow is strong enough to put himself above his neighbour. Two conditions suffice to ensure the growth of slavery or of a servile caste in the savage world. The first condition is a certain development of industrialism. In a hunter tribe, which lives from hand to mouth, there is little occasion for the services of a slave. The harder and less interesting work can be put upon the women, and the chief occupation of the men is to fight. This brings us at once to the second condition, which is a measure of warlike prowess, giving to a tribe the means of supplying slaves from its captives. But not only must a tribe that is to obtain captive slaves, conquer; it must also refrain from putting its captives to death, and we have already seen how the difficulty of exercising such restraint militates against the rise of slavery in savage society, and how, in consequence, though the idea of slavery is widely diffused in the uncivilized world, the institution grows more important step by step with the development of civilization. We find many civilized people, where slavery has attained a luxuriant growth, retaining a tradition of a time at which there were no slaves, and these traditions may well preserve an historical truth. But the enslavement of the vanquished is not the only alternative open to a conquering people. Instead of apportioning the captives to individuals as their booty, they may reduce the conquered tribe collectively to a servile position. In that case we get from the first a system of public serfdom. In other cases, again, possibly as a development of this practice, the distinction

of conqueror and conquered hardens into a distinction of caste sanctioned by religion. Finally, the development of military organization, and the consequent rise of the power of the chief, are responsible for that form of "rightlessness" in which all members of the tribe become slaves of the king.[1]

In one or other of these different forms we find the conception of a class of men, wholly or partly destitute of rights, widely diffused throughout the uncivilized world. The special home of slavery is, of course, Negro Africa, where the exceptions in which the institution is not found are quite inconsiderable.[2] In Oceania there is more variety. In some of the islands, as has been seen, war is but little known, and in these cases slavery is also absent;[3] but there are other causes militating against its development. In Melanesia cannibalism is frequent, and, in some cases, for example in Fiji, slaves are kept for cannibal purposes.[4] In Micronesia, again, a strongly-marked caste division partially replaces slavery, though there may be slaves in the proper sense in addition to the servile caste. Throughout

[1] Post, *Afrik. Jurisp.*, vol. i. p. 115, seq., gives a number of African peoples in which the king has absolute powers of life and death over his people, and a number in which all subjects are regarded as his slaves. Among the Kaffirs the king could take any man's cattle to replace his own.

[2] According to Waitz, vol. ii. p. 398, slavery was for the most part unknown among Kaffirs, and the case of a sale of children recorded by Moffat is regarded as exceptional. A less favourable view of Kaffir warfare is taken by Letourneau (*Esclavage*, p. 53), who says that they took girl prisoners as concubines and youths as slaves, though their manners were too savage for regular slavery. Letourneau also draws attention (pp. 54, 55) to a servile class, called balala, among the Bechuanas, who had no possessions, had to perform manual labour in return for food, might be slain for disobedience, and supplied victims for human sacrifice upon occasion. We have here something more nearly approaching a caste distinction than ordinary slavery.

The Hottentots, according to Letourneau (*ib.*, pp. 49-51), gave no quarter and held no slaves, but, according to authorities cited by Kohler (*Z. f. V. R.*, 1902, p. 340), slavery, though it has now disappeared, existed formerly, and the slaves were at the masters' mercy and often ill-treated.

[3] For example, in the little island of Rotuma slavery proper did not exist and casual strangers were usually married and adopted into a clan. Some Fijians and Melanesians, however, have been treated as inferiors, not being adopted. (J. S. Gardiner in *J. A. I.*, xxvii. p. 486.) In parts of New Guinea there is no slavery (Letourneau, p. 39); it is the exception among the Papuas. (*Ib.*, p. 35, and Kohler, *Z. f. V. R.*, 1900, p. 364.)

[4] Letourneau, *op. cit.*, p. 41. Broadly, Letourneau concludes Melanesian slavery originated for the sake of cannibalism.

Polynesia caste is more prominent than slavery.[1] It is a Polynesian saying, that "a chief cannot steal," and in Tahiti, if a chief asks, "Whose is that tree, etc.," the owner answers, "Yours and mine." The killing of one of the lower by a member of the higher class is regarded as merely a peccadillo.[2] In Micronesia the original principle of the constitution seems to have been a division into two castes, the one god-like, immortal, and possessing all the power; the other having no souls, no property, no wives, and doing all the hard labour; but below these again were the enslaved prisoners.[3] In the Malay region slavery is widely diffused, especially in the towns,[4] though, as we shall see later, its forms differ, and in some cases, particularly under Mohammedan influence, the slave is by no means rightless. Among the rude Indian hill tribes the institution is naturally less developed. In some cases, as among the Bodos and Dhimals, there are apparently no slaves, and the same is said to be true of some of the Naga tribes. Other Nagas, however, make slaves of captives,[5] and among many other hill tribes slaves are held.[6] The nomad tribes of Central Asia do not generally spare their captives, and still practise human sacrifice, but the richer tribes are slave-holders.[7] Among the North American Indians slavery is but little developed east of the Rockies, though there were a few tribes which occasionally practised[8] it as an alternative to the torture or adoption of

[1] Thus in the Marquesas Islands there were no slaves, but a despised lower class who furnished victims for human sacrifice. (Letourneau, p. 183.)

[2] *Ib.*, 188.

[3] Waitz, v. ii. p. 125. In the Carolinas not only was intermarriage forbidden, but the lower caste had to avoid contact with the higher on pain of death. Fishery and sea-faring were forbidden occupations to the lower caste.

[4] See Waitz, *Anthropologie*, v. i. 154, seq.; Ratzel, *History of Mankind*, i. 446.

[5] Slavery is said to be universal among the Aos (Godden, *J. A. I.*, xxvi. p. 184), but the Luhupas and one or two other tribes are said to have no slaves and to be opposed to the institution. All the Nagas are head-hunters. (Godden, *J. A. I.*, xxvii. p. 12.)

[6] *E. g.* Kukis, Garos, Gonds and Khonds, who use slaves for sacrifices. The Lakka Kols have serfs instead of slaves. (Letourneau, pp. 305, 306.)

[7] Ratzel, vol. iii. p. 346. According to Letourneau (p. 223), a form of serf cultivation is more strongly developed than personal slavery.

[8] *E.g.* according to Waitz, vol. iii. p. 158, the tribes of North Carolina, the Navajos, Iroquois and Hurons.

prisoners. In the west and north, however, it was widely diffused,[1] though here also, in some cases, the indiscriminate massacre of prisoners was the common alternative. In the tribes of tropical South America slavery appears to be confined to war captives, but prisoners may also be put to death or adopted as members of the tribe.[2]

Thus while avoiding undue generalization we may fairly say (1) that in the rudest tribes there are no class distinctions, the harder and more menial work falling often (though not always) upon the women; (2) as a tribe grows in culture, and especially in military strength, the first result is, as a rule, that the conquered enemies are sacrificed, eaten, tortured, or in any case put to death. But (3) with a certain softening of manners, or at any rate with a cooler perception of permanent advantage, prisoners are spared and enslaved. This grace is first reserved for women and children, but is afterwards extended to male captives. A class is thus formed who are within the jurisdiction of the conquering tribe, but from the point of view of law and morals remain outside it. Either in the form of a class of slaves or of a degraded quasi-servile lower caste, the presence of such an element in the population is a general feature in societies which have emerged from the lower savagery and the rawest militarism. On the strict principle of group-morality this class is destitute of rights, and only too often the principle is consistently carried out. The typical slave can neither marry nor hold property except on sufferance. His very life is in his master's hands. He may be flogged, maimed, sold, pawned, given away, exchanged, or put to death.

3. In many slave systems, however, this "rightlessness" is

[1] Thus among the Oregons prisoners were enslaved "from time immemorial" and sometimes sacrificed at the death of a master. (Alvord in Schoolcraft, v. p. 654.) Slavery is said to have extended over the whole north-west coast. (Waitz, vol. iii. p. 329.) At Nootka Sound prisoners when spared were enslaved. The Chinooks made slave razzias and held the slave as a chattel and object of trade. (*Ib.*, pp. 334, 338.) The Apaches killed the male captives, but sometimes held the women as slaves. (Reclus, p. 128.)

[2] Schmidt, *Z. f. V. R.*, 1898, p. 294. According to Letourneau (p. 123), the Nomads of the Pampas rarely give quarter to males, but sometimes take women as slave concubines and bring up children to be adopted into the conquering tribe.

qualified in various ways. How this qualification arises we shall best understand if we take a more complete view of the actual sources from which slaves are recruited. Hitherto we have spoken only of captives in war. But this, though probably the original method by which a servile class is formed, is not the only method by which it is recruited. Of other methods the first and greatest is inheritance—for normally a slave's child is also a slave. Secondly, in most barbaric and semi-civilized societies the numbers of the slave class are swollen by other causes, principally by debt, crime, and the slave trade. In some cases slavery is the prescribed penalty for crime. More often the man who cannot pay the prescribed composition either falls into slavery himself as a debt-slave in order, as it were, to work out his debt, or sells, particularly under the sway of the fully developed *patria potestas*, his wife or child for that purpose. "What! shall I starve as long as my sister has children whom she can sell?" was the remark of an African negro to Burton—a remark which comprises a whole chapter upon primitive ethics in a few words.

The formation of debtor-slaves, and even the increase of hereditary slaves, has, however, a certain softening influence upon the institution of slavery itself, for while the captive slave remains an enemy in the sight of law and morals and is therefore rightless, the debtor or the criminal was originally a member of the community, and in relation to him there is apt to arise some limitation of the power of the master. The family of the debtor-slave will not see him treated with unlimited cruelty; they retain some right of protection, however illogically, just as they retain protection over the purchased wife, however illogically. In fact the slave is no longer a mere stranger or enemy. He is partially incorporated in the community and has some recognized rights, though by no means those of a free man. The improvement tends to extend itself to the hereditary slave who also was born in the community, though within the slave class. Thus there comes to be a distinction between the domestic slave and the slave who is captured or bought from abroad. The one remains a chattel-slave, the other is becoming a serf. There are thus many gradations of "rightlessness" in the servile status, and these must very briefly be passed in review.

Customs protecting the slave from undue tyranny are found in the barbaric and semi-civilized world, though in many cases they are not derived from barbaric ideas, but are traceable to the influence of Mohammedanism. In these customs the distinction between the domestic and the foreign slave is generally well marked. Illustrations of almost every degree in "rightlessness" may be drawn from African slavery. Thus, among the Foulah, house slaves are treated as members of the family, and are sold only in necessity or for a punishment, while war captives and purchased foreign slaves are wholly without rights. In Bambara captives are pure chattels, but house slaves have a good position and in some cases are treated as members of the family. Among the Timmanees, the Bulloms, and the Beni-amer, no one is sold as a slave who was not bought as such. Among the Mandingoes native slaves are protected, while others are at the mercy of the master to sell or kill. On the Congo the captive slave may be sold, but house slaves only after a palaver, that is, with the consent of the community. Among the Barea and Kunama the master has no right of life and death over native slaves. At Timbuctoo no native can be enslaved at all. Among the West Equatorial tribes the slave may be killed by his master, but not sold abroad except for some transgression. At Nuffi a master may strike, but not mutilate or kill his slave. In Sokoto and among the Yolofs the captive slave may be sold at will, the born slave only after repeated chastisement. In Bihé pawn-slaves are protected, while bought ones can be arbitrarily punished, and only in the case of their death is a small fine due from the owner to the king. Among the Mpongwe the house slave can only be sold for some offence, and here slaves call their master "father" and are well treated. The Fantis recognize the distinction between the slaves of their own tribe and those of other tribes, and among the Ibu, on the Niger, slaves can hold property, build houses and marry.[1] They then rank as free, owing only a yearly tax, and the relation, in fact, passes into a kind of light serfdom. Similarly at Sokoto the slave is at about the age of twenty given a wife and set up in a hut in the country. At Boussa they farm the land on the métayer principle, and though in law the masters could sell them and take their wives, children

[1] See Post, *Afrik. Jurisprudenz*, i. pp. 88, 92, 96; Waitz, ii. 213–214.

and goods, in practice they enjoy much liberty and property.[1] Various forms of serfdom, existing often side by side with slavery, are common in Africa, the serf cultivating the land and owing labour service or payment in kind, and sometimes holding property of his own.[2]

A right frequent in Mohammedan countries, found also in one or two instances of non-Mohammedan tribes, is that of changing the master. This a slave can effect by the legal process of *noxæ datio*, by which, on inflicting some injury on some man other than his own master, he, *ipso facto*, becomes that man's slave. Among the Barea and Kunama a native slave can simply leave for another village and so become free. In Zanzibar slaves obtain this right as the result of deliberate ill-treatment, and the same custom is found on the Congo, among the Apingi, and other West Equatorial tribes. In Ashanti slaves can commend themselves to a new master by giving him the right of life and death over them, and in Timbuctoo, if ill-treated, a slave may appeal to the court in order to be sold. Among the Beni-amer the distinction between the born slave and the foreign slave is well marked in the case of homicide. For the bought slave only the "wer" can be demanded, but the born slave can be avenged by blood. The marriage of slaves depends generally upon the will of the master. In relation to property their rights vary greatly, and here again the distinction of origin of slaves makes itself felt, *e. g.* among the Bogos and Marea a slave who is the son of a free-born man has the right to buy his freedom, a right which is denied to the slave by birth.[3]

Of the various tribes mentioned, those in which protection is carried furthest are for the most part either partially Mohammedanized or partially Christianized,[4] and while some distinction between domestic and foreign slaves may be attributed to

[1] Letourneau, p. 103. Yet at Sokoto captive slaves, besides being frequently sold, are treated as beasts of burden and chained for trivial offences. (Post, *A. J.*, i. p. 96; Letourneau, *L'Esclavage*, p. 102.)

[2] For instances see Post, *Afrik. Jurisp.*, pp. 98, 101, 106. In case of failure to make due payments the serf is often reduced to the position of a slave, *e. g.* among the Takue, Marea, and Bogos. Among the Beni-amer the penalty of failure is death. (Post, *A. J.*, i. p. 101.)

[3] Instances are found at Khartoum, among the Usagara, the Futatoro, and among the Kimbunda. (Post, *A. J.*, 103, 105, 112.)

[4] Letourneau, 88.

Negroland generally, such further amelioration of the slave's position as is to be found in barbarous or semi-civilized Africa is probably to be attributed to the higher ethics of a civilized religion.[1] The same influence is found at work among the Malays, where the distinction of native and foreign slaves also re-appears. Speaking generally, the captive slaves are destitute of rights, and the capture and sale of slaves is a chief line of business among all Malays who trade in ships of their own. But crime and debt are also rich sources of slavery,[2] and in some parts at least the slave has a measure of protection. In the Malacca Peninsula, where the influence of Islam is strong, the slave if struck may bring his master into court, and the slave woman who bears a child to her master goes free.[3] The Battaks also, head-hunters though they are, put a limit on the master's right of punishment.[4]

Thus in the barbaric world we already find degrees of rightlessness, and a measure of legal or customary protection, at least for certain classes of slaves. This alleviation is often but not always[5] traceable to the influence of one of the higher religions. The free man who has become a slave is not wholly cut off from membership of the community, but retains certain recognized rights, though by no means those which full membership confers. We have now to see how the idea of slavery, and of rightlessness generally, fare in the main forms of civilization.

4. In the early Babylonian Empire slavery was fully developed as an institution, though slaves were not so numerous as they

[1] Letourneau, p. 72, seq.

[2] Waitz, v., i. 143, 153.

[3] *Ib.*, 153–5.

[4] According to Letourneau (p. 200), the master may punish, but not put the slaves to death. According to Waitz, *op. cit.*, p. 188, punishment must be inflicted by a magistrate. The slave becomes a concubine by prolonged cohabitation, and sometimes a legitimate wife. (Letourneau, *l. c.*) Among the more savage Battaks slaves are used for human sacrifices. (Letourneau, p. 203.)

[5] Apart from some of the instances already given, in ancient Mexico, where captive slaves were taken principally for food, domestic slaves were protected. They might not be sold without their consent, nor chastised without previous warning. If ill-treated they might take refuge with the king, and to kill them was a capital offence. They could hold property and marry, and their children were free. (Letourneau, pp. 157, 158; cf. also Payne, vol. ii. p. 485, note 3.)

afterwards became. The slave is spoken of in the contracts[1] not as a man, but as a chattel. Slaves are reckoned in a transfer as so many pieces of goods. They were distinguished by a brand, and, if they were runaways, often wore fetters.[2] They are recruited by capture, by debt, and by the sale of wives or children by husbands or fathers. They pass on a man's death to his heirs, and can be pawned, given away or sold. With the exception of debt-slaves, the Code of Hammurabi makes no provision for their protection against their masters. The only case in which it prescribes any treatment is that of the repudiation of their master, in which the penalty assigned is the comparatively light one of losing an ear. In practice, however, it would seem that the punishments for running away were severe.[3] The provisions in the Code for cases of injury to a slave by some one other than his master are full of significance. The slave's life has its price, but clearly the price goes to the master, for in the passages which refer to the killing of a slave the law is that the offender shall render slave for slave. For example—

"If a doctor has treated the severe wound of a slave of a poor man with a bronze lancet and has caused his death, he shall render slave for slave.

"If he has opened his abscess with a bronze lancet and has made him lose his eye, he shall pay money, half his price."[4]

Similarly, the defaulting builder who causes a free man's death is punished by the law of retaliation, but if it is a slave who dies "he shall give slave for slave."[5] This is pleasant for the master, but of no particular value to the slave, and so when sect. 199 says that if a man "has caused the loss of the eye of a gentleman's servant, or has shattered the limb of a gentleman's servant, he shall pay half his price," we may assume that it is the owner who benefits.[6] The loss of life or limb by a slave is

[1] The contracts yield no instance of more than four in a family, and great houses often have only one. (Meissner, *Altbabylon. Privatrecht*, pp. 6, 7.)

[2] Meissner, *loc. cit.* [3] Meissner, *loc cit.*, and *De Servitute*, p. 2.

[4] Hammurabi, secs. 219, 220. [5] *Op. cit.*, sec. 231.

[6] Compare the clauses dealing with miscarriage, 213, 214: "If he has struck a gentleman's maidservant, and caused her to drop that which is in her womb, he shall pay two shekels of silver. If that maidservant has died, he shall pay one-third of a mina of silver."

loss to the master, and is made good by compensating him—so completely is the slave his chattel.[1] Debt-slaves, however, were, as has been noticed, in a more favourable position. Their bondage is limited to three years. If a man has a debt, says clause 117, "and he has given his wife, his son, his daughter, for the money, or has handed over to work off the debt, for three years they shall work in the house of their buyer or exploiter, in the fourth year he shall fix their liberty." Further, the person seized by a creditor in distraint is protected by retaliation or price, according as he is a free man or slave.[2]

In practice the position of the Babylonian slave was probably much more favourable than it appears in legal theory. In the records of the New Kingdom, slaves often appear as principals in business transactions. They carry on trades or businesses, such as banking, and have a *peculium* which is virtually assured to them, though in law it may be their master's, and for which they pay a yearly tribute to the owner. Out of this *peculium* some slaves, if not all, might buy back their liberty.[3] We find them entering into contracts with other slaves and even with free men, suing and sued at law, and in many ways acting as though free.[4] On the other hand, they might be branded. The rich Itti-Marduk-Balatu buys two slaves, one marked on the ears and the eyes and one who is simply described as branded, for three *minae*.[5] This same great banker disposes of a slave girl to one purchaser after another for immoral purposes, and a contract selling a woman to a brothel-keeper is preserved.[6] The slave girl was entirely at the disposal of her master, and indeed, if he totally neglected her, it was held that she would in time become a malevolent being with demoniac powers, against whom magical conjurations were pronounced.[7] Slaves were freely pawned, given away and sold. Putting all the facts

[1] Notwithstanding the bad legal position of slaves, the code contemplates the marriage of slaves with free women, sec. 175.

[2] Sec. 116. The clause contemplates distraint upon the person only (Dareste, *Journal des Savants*, Oct. 1902, p. 526), and apparently the seizure of the son or slave of the actual debtor.

[3] Oppert, *Condition des Esclaves à Babylone*, p. 4.

[4] Kohler and Peiser, *Aus dem babylonischen Rechtsleben*, hft. i. 1; ii. 6.

[5] Meissner, *De Servitute*, p. 20.

[6] Kohler and Peiser, *op. cit.*, iv. 28, 29.

[7] Maspero, *Dawn of Civilization*, p. 735.

together, it would seem that there were different classes of slaves, distinguished in practice and by custom if not in law, and that, while some of them had practical enjoyment of various important rights, the conception of chattel slavery had by no means disappeared.

Our information as to ancient Egyptian slavery is not so precise as it is for Babylon, and when dealing with a history extending over, perhaps, four or five thousand years, it is easy to make statements which would be true of one period, but would not hold of others. Some broad features, however, appear tolerably constant. The main sources of recruitment of slaves in the full sense of the term were capture and the slave trade. The conquering Egyptians did not always kill all their male captives, but frequently took them alive, and throughout their history down to the New Kingdom, frequently organized warlike expeditions or *razzias* for the purpose of slave-hunting.[1] Prisoners were taken for service on the public works,[2] or to the harems, and it appears from the Tell-el-Amarna letters, that, in addition to thousands of female slave captives, there was a regular tribute of girls from various places.[3] On the public works, the pyramids, the great temples and palaces, the labour and lives of the captives were prodigally spent. Rameses IV., in one expedition for transporting great blocks of granite, employed 5000 common soldiers, 800 barbarian mercenaries, 2000 bond-servants of the temples and 200 officers. When foreign captives were not available the Pharaohs employed their subjects.[4]

An idea of the number of slaves in Egypt may be formed from the fact that in the course of thirty years Rameses III. presented 113,433 to the temples alone.[5] These slaves were apparently entirely at the disposal of their master, who removed them from place to place, sold them, used them as he pleased, pursued them if they succeeded in escaping, and had the right of re-capturing them as soon as he received information of their

[1] See above, Chap. VI. pp. 255, 256.

[2] Diodorus describes the suffering of captive slaves, including women and old men, in the Nubian gold mines. His description refers to the times of the Ptolemies, but there is no reason to suppose that things had got any worse under the rule of the Greeks. (Erman, *Life in Ancient Egypt*, 463; Diodorus, iii. 11.)

[3] Flinders Petrie, *History of Egypt*, vol. ii. p. 274.

[4] Erman, p. 476.

[5] Maspero, p. 326.

whereabouts. They worked for him under their overseers' orders, receiving no regular wages, and with no hope of recovering their liberty.[1] The captives, however, apparently intermarried frequently with natives, and had families and descendants who, at the end of two or three generations, became assimilated with the indigenous races, and passed into the condition of serfdom, in which the mass of the native Egyptian population appears to have lived. How far this serfdom extended, and what classes were free, it is difficult to say with precision. Erman points out that in the early Empire, if we went only by the monuments and representations in the tombs, we might conclude that there was no intermediate class between the great men in the kingdom, the priests and officers, on the one hand, and the crowd of labourers and serfs on the other; but probably there must have been some middle class which helped to bring Egyptian art and handicraft to their pitch of perfection.[2] In the New Kingdom the peasant serfs were strictly part of the property of the crown, or the temple to which the land belonged. They were despised by the scribes, and their condition is the subject of many contemporary descriptions implying abject servility.

The following verses refer to the slaves—

> "The poor child is only brought up,
> That he may be torn from his mother's arms;
> As soon as he comes to man's estate,
> His bones are beaten like those of a donkey;
> He is driven, he has indeed no heart in his body."[3]

Even more graphic are the descriptions in the Sallier papyrus—

"The stone-cutter, who seeks his living by working in all kinds of durable stone, when at last he has earned something, and his two arms are worn out, he stops; but if at sunrise he remain sitting, his legs are tied to his back. . . . When the (mason's) work is quite finished, if he has bread, he returns home, and his children have been beaten unmercifully (during his absence). The weaver within doors is worse off there than a woman; squatting, his knees against his chest, he does not breathe. If during the day he slackens weaving, he is bound fast as the lotuses of the lake;

[1] Maspero, *loc. cit.* In a large measure the slave work was done in the regular workhouses, or *ergastula*. For the employment of bondwomen in these places, see W. Max Müller, *Liebespoesie*, p. 6.

[2] Erman, pp. 100, 101.

[3] Erman, p. 128

and it is by giving bread to the doorkeeper that the latter permits him to see the light."[1]

More than this, it would seem that even the free man, who was unrestricted in his power to move about and dispose of himself and his labour, was insecure unless he had his master, who would afford to him protection. Egyptian society, in fact, was organized upon a feudal basis.

"From the top to the bottom of the social scale every free man acknowledged a master, who secured to him justice and protection in exchange for his obedience and fealty. The moment an Egyptian tried to withdraw himself from this subjection, the peace of his life was at an end; he became a man without a master, and . . . without a recognized protector. . . . Any one might stop him on the way, steal his cattle, merchandise and property on the most trivial pretext, and if he attempted to protest, might beat him with almost certain impunity."[2]

Further, it is only in a qualified sense that freedom can be spoken of at all in relation to a country governed as Egypt was. As against the king or a great feudal lord, the Egyptian peasant often, if nominally free and possessed of his own plot of land, was without defence and without recognized rights. The tax-gatherer was in ancient Egypt what he remained to the Modern Period. Here is the description of him true to the life in the Sallier papyrus[3]—

"The scribe steps out of the boat at the landing-place to levy the tithe, and there come the keepers of the doors of the granary with cudgels and the negroes with ribs of palm-leaves, who come crying: 'Come now, corn!' There is none, and they throw the cultivator full length upon the ground; bound, dragged to the canal, they fling him in head first; his wife is bound with him, his children are put in chains; the neighbours, in the meantime, leave him, and fly to save their grain."

The system of forced labour was no less oppressive to the peasantry than that of the collection of taxes. The slaves were insufficient to cultivate the royal and seignorial lands, and the balance of the work fell upon the neighbouring peasantry, none being exempt except the destitute, soldiers on service, with their families, certain public employés and servitors of the temple.

[1] Maspero, p. 312. [2] *Ib.*, 309. [3] *Ib.*, 331.

The work was hard, and enforced by the stick, and not only did it recur at regular periods, but in addition there were irregular corvées whenever it suited the king or lord to demand them.[1]

The slave, properly so called, was not indeed wholly, or at any rate not at all times, destitute of rights. According to Diodorus his murder was punished with death, the object of the law being, in the view of the Greek historian, to keep people from bad actions not through differences of fortune, but rather from the nature of the actions themselves, and at the same time to accustom a man by care for slaves to avoid far more all offences against free men.[2] This is a thoroughly Greek interpretation of the facts. If Diodorus is correct, the explanation is rather that before the overwhelming might of the king and his officers, the distinction of bond and free became of very secondary account. The free man was himself rightless in the Egyptian constitution, for the king was by Egyptian principle master of the whole land of Egypt, owner of all property and lord of all men who dwelt therein. The position, as in other Oriental countries where despotic authority has gone to its full length, recalls rather the despotism of the African potentate than any Greek maxims of the value of free men. The Egyptian recognized duties to dependants, as appears from pleadings in the *Book of the Dead*, in which the deceased denies that he has oppressed those under him.[3] But these are rather the duties of benevolent consideration than of legal right. Egypt is a typical Oriental monarchy, a country in which it may be rather said that all classes were rightless than that slaves were distinguished from free men by the lack of rights.

5. The history of slavery among the Hebrews is interesting, both for the strong distinction made between Jew and Gentile, and

[1] *Ib.*, 333, etc. Most of our information refers to the Ptolemaic period, but the practice was undoubtedly more ancient, being referred to in inscriptions of the Middle Empire.

[2] Diodorus, i. 76–7.

[3] In another well-known pleading, the soul protests according to some translators that he has not caused harm to be done to the servant by his chief. This, if correct, is an interesting recognition of a social duty to the slave, but the translation is uncertain, and Mr. Griffith renders it: "I have not turned the servant against his master." (*World's Literature*, p. 5321.)

still more for the progress which we can trace in law and custom affecting the position of the slave. According to the later law all the Canaanites ought to have been utterly destroyed upon the conquest, but this represents an ideal of barbarity which there is no reason to think was ever realized, and the narrative itself admits as much, especially in the case of the Gibeonites, who became "hewers of wood and drawers of water."[1] Whether by capture or by purchase Gentiles clearly became slaves, and the law ended by regarding the Gentile as the only slave whom a Hebrew ought in strict propriety to hold. Further, though the stranger is constantly recommended to consideration and just treatment, laws for the protection of the slave apparently apply in the main to the Hebrew only. We pass now to the consideration of these laws.

In the earliest code[2] the period of service for a male Hebrew is limited to six years. "In the seventh he shall go out free for nothing." But the case is contemplated that his master has given him a wife, and in that case she, with her children, would remain with her master, and he might therefore choose to abide also. If so, "then his master shall bring him unto God (that is, to the temple) and shall bring him to the door or unto the door-post, and his master shall bore his ear through with an awl; and he shall serve him for ever."[3] The Hebrew father might sell his children into slavery, and the daughter who had thus been sold was not released in the seventh year, as were the men-servants; but she might be redeemed, and if not suitably married to the son of her master, regain her freedom. As to general protection, "If a man smite his servant or his maid with a rod and he die under his hand, he shall surely be punished"—in what way is not stated. The protection given to the slave would be more valuable if it were not for the qualifying clauses which follow. "Notwithstanding, if he continue a day or two he shall not be punished; for he is his money."[4] This is chattel slavery partially ashamed of itself. The code further provides that either a male or female slave should obtain freedom for the loss of an eye or a

[1] Further, Solomon levied tribute of bond service upon all the Canaanites left, but not upon the Israelites. (1 Kings ix. 21.)

[2] Exodus xx.–xxiii.

[3] Ex. xxi. 2–6.

[4] Ex. xxi. 20. Here the qualification "Hebrew" does not appear, but it is perhaps to be understood from its use earlier in the chapter.

tooth. As in the Code of Hammurabi,[1] the master takes the value of the servant when he is killed by another man's ox, the price being fixed at thirty shekels of silver. It is a noteworthy inconsistency that retaliation is to be exercised upon the ox in this instance—that is to say, it is to be stoned to death. But where the ox gores a free man or woman, retaliation can also be exercised upon the master (supposing he has been guilty of negligence) unless he can buy himself off. The distinction is significant of the true position of the slave as a chattel whose price must be made good, rather than as a human being for whom retaliation can be demanded.

The code of Deuteronomy does not make any fundamental change in the position of the slave, though here, as in other respects, it breathes a more humane spirit. In this code the Fourth Commandment reads differently, the remark being inserted, "that thy man-servant and thy maid-servant may rest as well as thou." The insertion of this considerate reason is thoroughly in keeping with the character of the prophetic code. The Hebrew slave is still to be released in the seventh year, and released with gifts. "When thou sendest him out free from thee thou shalt not let him go away empty. Thou shalt furnish him liberally out of thy flock," and so forth. "Thou shalt remember that thou wast a bondman in the land of Egypt and the Lord thy God redeemed thee."

The provisions as to the marriage of the slave to a wife provided by his master disappear, and the Hebrew woman is to be free as well as the man. Nor is there here any reference to the sale of daughters. The man-stealer is (as in the earlier code) to be put to death, but apparently only when offending against an Israelite;[2] and by a not infrequent inconsistency the fugitive slave is not to be given up, but "shall dwell with thee, in the midst of thee, in the place which he shall choose within one of thy gates where it liketh him best. Thou shalt not oppress him."[3]

In the priestly code the most definite change is one which appears at first sight reactionary. The slave is now to be released, not in the seventh year, but in the year of Jubilee; yet, in other respects, the code is considerate to the Hebrew slave,

[1] Hammurabi, sec. 252. [2] Deut. xxiv. 7. [3] Deut. xxiii. 15.

and indeed denies that he ought to be a bondman at all. "If thy brother be waxen poor" the true duty of the more fortunate Hebrew is to uphold him. "As a stranger and a sojourner shall he live with thee," but if he "sell himself unto thee, thou shalt not take him to serve as a bond-servant. As a hired servant and as a sojourner he shall be with thee; he shall sojourn with thee until the year of jubile."[1]

It is the Gentile—and here is the true spirit of ancient slavery—it is the Gentile who is the appropriate bondman. "As for thy bondmen and bondmaids . . . of the nations that are round about you, of them shall ye buy bondmen and bondmaids. Moreover, of the children of the strangers that do sojourn among you, of them shall ye buy." "Over your brethren ye shall not rule with rigour."

Thus the Levitican code comes as near as possible to the abolition of Hebrew slavery. Nevertheless, it lengthens the term from seven years to fifty. The explanation of this change is probably to be found in a passage in Jeremiah,[2] from which it appears that the provision for releasing the slaves in the seventh year was practically, if not avowedly, a novelty in Josiah's time. It is of course treated by Jeremiah as having belonged to the original Covenant; but nevertheless it appears from his account that King Zedekiah proclaimed this liberty as a new thing, doubtless in accordance with the recently-promulgated code of Deuteronomy; and that, while it was temporarily obeyed, a relapse very speedily followed for which punishment by pestilence and famine is proclaimed. It would seem, therefore, that the law of Jubilee, while probably of ancient date and a survival of communal tenure so far as regards land, is applied to slaves in the hope of rendering the benevolent intentions of Deuteronomy a practical reality.[3]

[1] Leviticus xxv. 35, 39, 40. [2] Jeremiah, chap. xxxiv.

[3] The picture of Hebrew slavery would not be complete without a reference to the attitude of the wise man in Ecclesiasticus. He bids his reader treat a good servant well, and not defraud him of release. This, of course, with an eye on the year of Jubilee. (Chap. vii. 21.) Indeed, he would have him treated as a brother: "For thou hast need of him as of thine own soul." And a more practical reminder follows, which may serve to help us, too, to understand a factor which must always have tended to mitigate the slave's lot: "If thou treat him evil and he run away from thee, which way wilt thou go to seek him." On the other hand, you should

In any case, regarded as a whole, the development of Hebrew law and custom in relation to slavery is an interesting example, on the one hand, of the amelioration of the slave's position by a distinct touch of humanitarian sentiment; and, on the other hand, of the persistence, owing to the dominance of an exclusive national religion, of the deep distinction between the domestic slave and the foreign.

6. *India.*—In India slavery was already known in the Vedic age. The institution persisted in the Brahmanic period, although its existence was denied by the Greek travellers of Alexander's time. Whether the Greeks only saw certain districts in which slaves were few or were misled by the absence of rural slavery is not certain, but the recognition of slavery as an institution in the Brahmanic law-books is perfectly clear. Manu distinguishes slaves of seven kinds—

"There are slaves of seven kinds, (viz.) he who is made a captive under a standard, he who serves for his daily food, he who is born in the house, he who is bought and he who is given, he who is inherited from ancestors, and he who is enslaved by way of punishment."

He proceeds to declare that, like the wife and the son, the slave has no property. The wealth which he earns is acquired for him to whom he belongs.

"A Brahmana may confidently seize the good of (his) Sudra (slave); for, as that (slave) can have no property, his master may take his possessions."

Quarrels with slaves are to be avoided. They should be treated, Manu says, "as one's shadow." If offended by them one should "bear it without resentment."[1] Much more moderate rules for their punishment are laid down than by the Hebrew lawgiver.[2]

But slavery is of very secondary importance in Hindu society as compared with caste. It would be out of place here to attempt a full discussion of the origin and nature of caste in

be severe with a bad servant, and if he be not obedient, put on him heavy fetters. Making a bad servant's side bleed is one of the list of things of which a man ought not to be ashamed. (Chap. xlii. 5.)

[1] Manu, viii. 415, 416, 417; iv. 185.

[2] See above, Chap. V. p. 193; Manu, viii. 299–300.

India. We have seen the more elementary forms of the institution in other races. In India it reached an altogether abnormal development, which is of more interest for the student of Hindu society than for the general history of ethics. Caste did not exist in the primitive society of Vedic times, though conditions out of which it in all probability arose were already present. The Aryans found themselves a conquering white minority among the subject, dark-skinned population, and the contrast between the Aryan and the Dasyu is already deeply marked. "Varna," the Sanskrit word for caste, means originally colour, and some at least of the Sanskrit authorities adopted the distinction of colour as their explanation of the origin of the institution.[1] In fact, towards the close of the Vedic age it would seem that the institution has taken shape. Four castes are mentioned in the Purusha-Sukta, one of the latest hymns found in the Vedic collection:[2] "When they formed Purusha, into how many parts did they divide him? What was his mouth? What were his arms? What were called his thighs and his feet?" The answer is that the Brahman issued from his mouth, the Kshatriya from his arms, the Vaisya from his thighs, and the Sudra from his feet. The first three, the priests, the warriors, and the farmers, were all Aryans and twice-born men. The Sudras alone were the once-born and the slaves of all the rest. These were the four original and legitimate castes. The mass of lower-caste men were held to have issued from various mixtures between the four original orders. Without attempting here to go into the Brahmanic theories of the origin and nature of caste in general, or dwelling on this occasion upon the position of the Brahman, it may suffice to quote a few laws from Manu illustrating the position of the Sudra, which tend to show the ethical analogy between a caste system and a slave system.

The Sudra in Manu is as such a born slave.

"A Sudra, though emancipated by his master, is not released from servitude; since that is innate in him, who can set him free from it?"[3]

If a Brahman requires any article for a sacrifice which he cannot find handy, "he may take at his pleasure, two or

[1] Muir, *Sanscrit Texts*, vol. i. p. 140. [2] Muir, i. 156, 157.
[3] Manu, viii. 414.

three articles from the house of a Sudra, for a Sudra has no business with sacrifices."[1] To kill a Sudra is a minor offence, placed in the same list with the cutting down of green trees for firewood, neglecting to kindle the sacred fires, superintending mines, stealing grain, etc., and the penance for killing a Sudra is to give ten white cows and a bull to a Brahman.[2] On the other hand, an assault by a Sudra upon any twice-born man is punished by mutilation of the offending limb.[3] The defamation of a Brahman or an insult to a twice-born man by a Sudra is punished with equal severity: "He shall have his tongue cut out, for he is of low origin"; while, "if he arrogantly teaches Brahmanas their duty, the king shall cause hot oil to be poured into his mouth and into his ears."[4]

For a Sudra to have anything to do with a woman of the twice-born caste was a serious offence, but as to marriage with a Sudra woman, Manu's opinion fluctuates.[5] Lastly, the Sudras serve as scapegoats. "O Takman," says the Atharva Veda, addressing the demon who brings fever, "go to the Mujavant or further. Attack the Sudra woman, the teeming one, shake her, O Takman."[6] The relative values of the lives of men of the four castes are summed up. "One-fourth (of the penance) for the murder of a Brahmana is prescribed (as expiation) for (intentionally) killing a Kshatriya, one-eighth for killing a Vaisya; know that it is one-sixteenth for killing a virtuous Sudra."[7]

It ought only to be subjoined that the distinction of caste was a matter of some perplexity to moralists, even in the Brahmanic age. Among the different accounts of castes given in the Mahabharata some roundly assert that character makes caste.

Nahusha, who had been condemned to take the form of a serpent, asks Yudhishthira the question: "Who is a Brahman, and

[1] Manu, xi. 13.
[2] *Ib.*, xi. 64, 65, 66, 67, 131.
[3] *Ib.*, viii. 279, 280.
[4] *Ib.*, viii. 270, 272.
[5] In one place, iii. 17, the Brahman who takes a Sudra to wife will, after death, sink into Hell; and other passages equally condemn any relations with Sudra women. (*E. g.* iii. 191, 250.) But in other places marriage with a Sudra is contemplated, and merely affects inheritance. In ix. 151, the son of the Sudra wife is to take one share of the estate as against three shares of the son of the Brahman; but in sec. 160, the son of a Sudra is not an heir at all. Commentators explain that this is the case in which the Sudra wife is not legally married.
[6] Duncker, *Hist. of Antiquity*, vol. iv. 281.
[7] Manu, xi. 127.

what is the object of knowledge?" Yudhishthira replies: "The man in whom are seen truth, liberality, patience, virtue, innocence, devotion and compassion"—he is a Brahman according to the religious tradition. The serpent answers, "But in Sudras also we meet with truth, liberality, calmness, innocence, harmlessness and compassion, O Yudhishthira." Yudhishthira replies: "Whenever a Sudra has any virtuous characteristics, and a Brahman lacks it, that Sudra will not be really a Sudra, nor that Brahman a Brahman. The man in whom this virtuous character is seen is a Brahman, and the man in whom it is not seen is a Sudra." The serpent proceeds: "If you regard him only as a Brahman whom his conduct makes such, then caste is of no avail until deeds are superadded to it." Thus pressed, Yudhishthira admits the confusion of castes in the actual world, and concludes that good conduct and the fulfilment of the prescribed ceremonies are alike necessary.[1]

Other passages declared that fundamentally "there is no difference of castes. This world, having been at first created by Brahma, entirely Brahmanic, became separated into castes in consequence of works";[2] and the speaker, Bhrigu, being now asked what constitutes membership of a caste, replies that—

> He who is pure, consecrated by the natal and other initiatory ceremonies, who duly studies the Veda, practises the six kinds of works, and the rites of purification, who eats of offerings, is attached to his religious teacher, is constant in austerities, and is devoted to truth, is called a Brahman. He in whom are seen truth, liberality, inoffensiveness, innocence, modesty, compassion and devotion, is declared to be a Brahman. He who is unclean, is addicted constantly to all kinds of food, performs all kinds of work, has abandoned the Veda, and is destitute of pure observances, is called a Sudra.[3]

Here we have an ethical doctrine of equality, or—which is the same thing—of distinction by merit alone, strictly in line with the teachings of Buddha, in whose Order there was no thought of caste, and for whom the true Brahman was he who lived the perfectly pure and holy life.

7. *China.*—In China a tradition is preserved of an epoch at which there was no slavery, and in the classical book of poems,

[1] Summarized from Muir, *Sanscrit Texts*, vol. i. 133–138.
[2] Muir, i. 140.
[3] Summarized from Muir, i. 142.

the *She-King*, there is little that points definitely to the existence of the institution in its strict sense. Few prisoners were taken at that time, and therefore it was very possible that slaves also were few, but the evidence appears clear that slavery did exist in the Chow Dynasty.[1] The institution is certainly ancient, and even at the present day general, although no doubt far less important than in some other countries. Debt slavery no longer exists, and in the pacific land of China war has ceased to be a source of supply; but the slave-trade is general,[2] and the sale of daughters by their parents, and of wives by their husbands, particularly in times of famine, is a rich source of recruitment of the slave class. Kidnapping is also frequent. The slaves, we are told, are generally treated well, and there is that social equality between mistress and slave-girls which we so commonly find in the East, mitigating the harshness of legal institutions. But the protection of the slave is very inadequate. It is true that the master has not the power of life and death, but the punishment for killing a slave is only the bamboo.[3] Further, if death is caused by a canonical or legitimate punishment the man is held guiltless;[4] branding, we are told, is but a small part of the punishment of a slave for running away,[5] while the slave who strikes his master is liable to death by beheading.

8. Slavery, like polygamy and divorce, was an institution which Mohammed found fully established among his fellow-countrymen, which he disliked and set himself to mitigate, but could not attempt to abolish. A difference, however, is made between Moslem and non-Moslem captives. In a war with Moslems prisoners were not enslaved. If the prisoner on the battlefield became a Moslem he might not be killed, but according to the

[1] Legge, *Prolegomena to the She-King*, p. 166, and footnote. In point of fact there are passages in the *She-King* itself which can hardly admit of two interpretations. (Vol. 2, Part ii., Bk. 4, Ode viii. Stanza 3.)

[2] Douglas, *Society in China*, p. 346.

[3] The punishment applies to deliberate murder or mutilation, with death as the result, and if the slave is innocent, banishment is added. (Kohler, cited by Post, *Grundriss*, i. p. 373.)

[4] If an innocent slave is put to death, his wife and children become free. (Kohler, cited by Post, *Grundriss*, i. 372.)

[5] Douglas, *op. cit.*, p. 350.

traditions he ought even to be set free, though if he became a Moslem subsequently he remained a slave.[1] The holding of Moslem slaves was not, as such, prohibited, but their emancipation was regarded as an act of special merit. According to the tradition: "Whosoever frees a slave who is a Moslem, God will redeem every member of his body limb for limb from hell fire."[2] Mohammed sought mitigation of the slave's lot by ethical rather than legal means. The slave has no civil liberty, and can only possess property by the owner's permission. The master's power is unlimited, and he is not slain for the murder of his slave. He has unlimited power over his female slaves; as a matter of law he may prostitute them; he may give a slave in marriage to whom he will, though he may not annul the marriage when once completed.[3] On the other hand, the Prophet enjoins upon Moslems to exercise kindness to slaves, forbids the prostitution of slave-girls as a religious offence, and enjoins emancipation whenever a slave is able to redeem himself. "When a slave of yours has money to redeem his bond, then you must not allow him to come into your presence afterwards." "Behaving well to slaves is a means of prosperity, and behaving ill to them is a cause of loss." "Whenever any one of you is about to beat a slave and the slave asks pardon in the name of God, then withhold yourself from beating him. Feed your slaves with food of that which you eat and clothe them with such clothing as you wear, and command them not to do that which they are unable." Wrongful punishment, which, in some institutions, as we have seen, is a legal ground of manumission, was held by Mohammed to be a moral ground. "He who beats his slave without fault or slaps him on the face, his atonement for this is freeing him." As an illustration of the spirit in which this behest was conceived, we may quote the story of the Caliph Othman, who, having twisted his memlook's ear, bade the slave twist his own.[4] A further

[1] But according to Hidayah, the conversion to Islam on the battlefield did not necessarily save a man from slavery. (Hughes, *Dictionary of Islam*, 597.)

[2] *Ib.*, p. 597.

[3] If a slave-girl has a child by her master she becomes free at his death, while if the child be acknowledged by the master, she becomes free thereupon. (*Ib.*, 597, 598.)

[4] *Ib.*, 599.

humane provision forbade the separation of mother and child: "Whoever is the cause of separation between mother and child by selling and giving, God will separate him from his friends on the day of resurrection."[1]

Conversely, the Prophet had certain promises for the dutiful slave: "It is well for a slave who regularly worships God and discharges his master's work properly"; and again: "When a slave wishes well to his master and worships God well, for him are double rewards." On the whole, the authorities tell us that the Prophet's rules of good treatment are observed. Masters are bound to maintain their slaves or emancipate them. To sell a slave of long standing is considered disgraceful, and female slaves are seldom emancipated without being provided for. The Egyptian slaves in Lane's time were numerous, but well cared for, and ranked socially above free servants. With all these mitigations it must be admitted that the recognition of the slave traffic by Mohammedanism has been, and is to this day, a curse to Africa and a source of disturbance to the world's politics.

9. *Greece.*—Like the Chinese, the Greeks had a tradition of a pre-historic epoch in which there were no slaves.[2] But in the Homeric epoch we find slavery in full swing, and the regular issue of the capture of a town is that the men should be slain and the women enslaved. Hector knows—and no thought is so bitter to him—that when Troy is taken and he himself is slain, it will be Andromache's fate to be a bondwoman to one of her conquerors. Her family had already suffered the same fate. The swift-footed, godlike Achilles had destroyed her father and her seven brothers, and had carried off her mother "with the rest of the spoil," though he afterwards set her free for an immense ransom. Now, Hector was all these to her, but the day would come when the Argives would sack the sacred town of Ilium and Hector in his turn be taken from her, and it would be her lot to fall into slavery.[3] Apart from legitimate warfare, piracy—which for that matter was in the Homeric view hardly less legitimate—was a frequent source of slavery.

[1] Though this saying is attributed to Mohammed, it is said by Tabir that "we used to sell the mothers of children in the time of the Prophet and of Abu Bekr, but Umar forbade it in his time." (Hughes, 599.)

[2] Herodt., vi. 137; Busolt, *Handbuch*, p. 11. [3] *Iliad*, vi. 414–495.

Many children suffered the fate of Eumaeus the swineherd, and were carried off by the pirate and sold across the wine-dark sea. Slavery was hereditary, and the slave might be sold or put to death, as the faithless female slaves were hanged by Telemachus.[1] On the other hand, slaves might own houses and property of their own and live in the practical freedom in which we find the goodly Eumaeus. Lastly, it should be noted that the slaves were not the only rightless class, for the stranger is also outside the protection of the law, though, even if a beggar and a fugitive, he is under the shelter of Zeus so long as he is a guest and claims the right of hospitality.

In the rural districts of Greece slavery remained rare. Pericles lays stress on the fact that the Peloponnesians are *autourgoi*—cultivators of their own lands.[2] It is even said that slave-holding was forbidden in Phocis and Lokris down to the fourth century.[3] But in the more developed states the growth of wealth meant, as always in the ancient world, increase in the number of slaves and—what was most fatal—the belief that work was not compatible with the dignity of a free man. Slavery remained a recognized fate for prisoners of war as an alternative to massacre, and even Plato could only hope that Greeks would abandon the practice of enslaving fellow-Greeks, restricting themselves to the barbarian, who, as Aristotle held, was the only natural slave. But through the institution of debt slavery the poorer classes in each state were frequently menaced with falling into enslavement. Before Solon's time the land was tilled by poor cultivators for the rich, and on their failure to pay five-sixths of their produce to the landlord, they fell into the position of serfs along with their wives and children. The prohibition of debt slavery and the pledging of the person by Solon was thus the salvation of civil freedom for Athens; and with the progress of Athenian democracy, although it was a democracy of free men only, the position of the slaves was indirectly improved. The master had the right of corporal punishment and of branding, but could not put a slave to death without a judicial decision.[4] A right of action for *ὕβρις* protected

[1] *Odyssey*, xxii., Trsl. Butcher and Lang, p. 374.
[2] Thucyd. i. 141.
[3] Busolt, p. 12.
[4] This held in other states as well. See Isocrates, *Panath.* 181, in

the slave from ill-treatment by strangers, and if maltreated by his master he could take refuge in the Theseum or some other asylum and demand to be sold—a demand which was investigated either by the priests or by a judicial process. On the other hand, the slave was not directly recognized as a personality by the law; he could only be represented by his master, who could sue for damages on his account. Except in murder cases he could only give evidence under torture, to which he might be given up at the will of his master, the belief being that this was the only way to get truth from him. He could only give evidence against his master upon a charge of treason. At the same time, he was often allowed to hold property and found a family, while he might buy his freedom by entrusting his earnings to a priest.

The development in the Dorian states was somewhat different. Here serfdom was more prominent than slavery, though the two institutions existed sometimes side by side. The Dorian conquerors divided part of the land among themselves, leaving it to be tilled by the conquered people as public serfs, while part was left to its original possessors, who were personally free but had no political rights. Hence the two classes of Helots and Perioeci. The conquered population were bound to the soil, but could not be sold or set free except by the State, though the landlord, for whom they cultivated the land at a fixed rate, was their immediate master. The Helots of Sparta, as is well known, were seditious, and were ill-treated and frequently put to death in fear, or at least in anticipation, of some rising. The Penestae of Thessaly, who were otherwise in a closely analogous position to the Helots, were better off in this respect, as they could only be put to death by judicial process. In Crete there were two classes of serfs, those on the public land and those belonging to private owners, who might contract a legal marriage and hold and inherit property, and, according to Aristotle, were treated by masters on terms of social equality. Besides these two classes of serfs there were slaves who might be bought and sold.

Busolt, p. 12. In the *Laws*, ix. 865, the slayer of his own slave is to undergo a legal purification corresponding to that imposed on the unintentional homicide of a free man, and incur no further penalty. For a case in which the killing of a slave might be treated as murder, cf. *ib.*, 872.

It should be added that the distinction between the citizen and the non-citizen is strongly marked throughout Greek history. Aliens were forbidden at Sparta altogether, and at Athens, where their numbers became great, they were as such destitute of rights, but in practice they were required to inscribe themselves on the list of resident aliens. They then came under special State protection, for which, and for the right to exercise a trade, they paid a certain tribute. They still required a representative in a law court, and had neither the right of marriage with citizens, unless by treaty with their own State, nor the right of holding land.[1]

The organization of the City State, in fact, led naturally to a deeply-marked distinction between the full citizen and all others, whether Greek or Barbarian, whether free or unfree. And we may take it as a mark of the ethical superiority of the Greeks that the logical consequences were so far mitigated, as we have seen them to have been in the legislation for the protection of slaves.

10. *Rome.*—At Rome the strict limitation of civil rights to full citizens, combined with the peculiar development of the powers of the paterfamilias, had a depressing effect upon the position of slaves. Not only captured enemies, but, even down to the time of Justinian, any unprotected foreigner was liable to enslavement. A free Roman could not become a slave within Rome itself, but deserters, and all those who were omitted from the census, could be sold abroad by the magistrate, children by their parents, debtors by their creditors, the thief by the injured party.

In practice the slave of the earlier period was, as a rule, fairly well treated, and there was probably no great social distinction between him and his master; but he was in law a chattel. He had no family of his own; his union (*contubernium*) was no legal marriage. He had no status in a court of justice, but if he wished to sue for an injury, could only do so through his master. Even if abandoned by his master he did not become free, but was the lawful property of the first comer. Not that cruel treatment passed without condemnation. Cruelty, even

[1] Busolt, pp. 12–14, 15, 68, 119.

to animals, was subject to religious and even legal penalties.[1] Gross cases might involve the intervention of the censor. Though the slave could legally hold no property, custom secured him his own *peculium*, and he might even come to purchase his freedom.

Such was the position of the slave in early Rome. The growth of the Roman dominion, the rise of the great estates, submerging the old freeholder with his small plot of ground, and the facility of obtaining slaves from the numbers thrown into the market by capture in war and by traffic with pirates, combined to give Roman slavery towards the close of the Republic a new and dark character. The land was cultivated in many districts by slave-gangs, working in chains and confined by night in prison workhouses under conditions described by Mommsen as such that by comparison with their sufferings it is probable that all that was endured by negro slaves was but a drop. But some relief came from the humaner ideas of advancing civilization, fostered by contact with Greek culture. In particular, the Stoic philosophy was the champion of the slaves. Seneca vigorously pleads their cause, and in particular reprobates the cruelty of the gladiatorial games. The jurists of the next century went further, and distinctly laid down that by natural law all men are equal and that slavery is a human institution contrary to nature. "Quod ad jus naturale attinet, omnes homines aequales sunt," writes Ulpian;[2] and more distinctly Florentinus: "Servitus est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur."[3] The Stoical teaching had its effect on legislation. The practice of the exposure and sale of children and of pledging them for debt was forbidden, while an edict of Diocletian forbade a free man to sell himself. Man-stealers were punished with death. The insolvent debtor was no longer made a slave. The right of bequest was granted to slaves. Some approach was made to a recognition of their marriage, not only after emancipation, but even[4] while in slavery, with a view to hindering the separation of families. Some legal security had already been given to their personal property, the *peculium*, by the prætorian

[1] Girard, *Manuel*, 89, 91.
[2] See Girard, p. 92.
[3] See Girard, p. 88, note 1.
[4] *Assez timidement*, Girard, p. 94.

edicts. The *Lex Petronia* (perhaps of A.D. 19) forbade throwing a slave to the wild beasts without a judicial decision.[1] Under Hadrian the power of life and death was taken from the master, and under Antoninus Pius the master who killed his own slave *sine causa* was punished as a homicide. An edict of Claudius had meanwhile enfranchised the old or sick slave who was abandoned by his master.[2] Under Nero the slave had been given the right to complain of ill-treatment to the magistrate. Under Pius the slave who was cruelly treated could claim to be sold, and by a special refinement it was held cruelty to employ an educated slave on degrading or manual work. Constantine deprived masters who abandoned new-born slaves, of their rights over them.[3] Emancipation, though restricted by Augustus, was again made easier, and though the use of torture at judicial investigation remained, it was in some respects limited.[4]

While the legal position of the slave was being thus improved by the imperial legislation, a new form of serfdom was growing up under the name of the Colonate. Some of the Coloni were probably foreign captives and immigrants settled upon the soil, while others were originally free tenants, who lapsed into a semi-servile condition through the insecurity of the times and largely through self-commendation. The status of the Coloni was regulated in the fourth century for fiscal purposes. Under Constantine, in 332, the Colonus could not quit his holding nor could he marry off the property of his lord. On the other hand, he could not be disturbed or be subjected arbitrarily to increased charges, and as the status was hereditary, we have here a fully-developed predial serfdom with fixed but limited rights for the serf.[5] The master might inflict moderate chastisement, but the Colonus had a legal remedy for injury or excessive demands.[6] While the Colonate was partly recruited from the previously free peasantry, a compensating process was going on whereby rural slaves obtained a settlement upon the land as quasi-Coloni or Casati. They were assimilated to

[1] Girard, p. 94. [2] *L. c.* [3] *Ib.*, p. 95.
[4] Ingram, *History of Slavery*, 60–64, etc. [5] *Ib.*, pp. 78, 79, etc.
[6] The Colonus could also contract a valid marriage, but he had to marry within the domain unless he purchased a dispensation. The right of punishment was conceded to the master for certain specified faults. (Letourneau, *L'Esclavage*, pp. 422, 423.)

the Coloni by the law of Valentinian I. in 377, could not be sold apart from the land, and by the end of the seventh century were merged in the Colonate.[1]

We have now reached a point in the history of slavery at which two fresh influences have to be considered. The first of these is the barbarian conquests; the second that of the mediæval Church. The German tribes, generally speaking, recognized chattel slavery, and slaves were recruited from the sources ordinarily recognized among barbarians — war, unprotected strangers, voluntary commendation, and in certain cases debt (*i.e.* in cases of incapacity to pay the wergild. This was the only form of debt slavery known.)[2] Even in Merovingian times the slave was a true chattel, whose life had indeed a price, but a price payable, like that of the Babylonian slave, to his lord, and not a fixed wer like a free man, but a sum proportionate to his value.[3] But besides the slaves, who were not numerous, the Germans recognized a class of imperfectly free men, the Liti, who had land of their own, without which a German could not be a citizen, but were in a dependent position. Their status varied very much from tribe to tribe, and from one period to another. At first tributary to the people, we find them at a later stage in subjection to an individual master. They took no part in the meetings of the people, and while originally they could plead before a court, their wergild was ordinarily half that of a free man. Their marriage with free people was a *mésalliance*, wherein the children followed the rank of the mother. As we approach the "Frankish" period we find their position more distinctly assimilated to that of serfs.[4]

11. Thus the Middle Ages begin with two fairly distinct classes of the unfree; on the one hand, the slaves proper, whose position has been ameliorated in Roman law, but remains that

[1] Ingram, *History of Slavery*, p. 80; cf. Viollet, *Histoire du Droit Civil Français*, p. 312. Valentinian prohibited their sale apart from the land.

[2] Schröder, *Lehrbuch*, p. 46.

[3] Schröder, p. 346. The price was, however, becoming a fixed tariff, and so gradually approximating to a true wergild. (*Ib.*, 218.)

[4] Schröder, pp. 50, 51, 221-223. In the latter period their position still varied very greatly as between different peoples.

of pure chattels by the law of the conquerors; on the other hand, a class of serfs in various degrees of unfreedom, which had already grown up in the later ages of the Empire and was reinforced by the corresponding class of Liti among the conquerors.

The moral influence of the Stoic philosophy which had inspired the imperial legislation for the benefit of slaves was now replaced by that of the Church. Like the Stoics, the Church accepted slavery as an institution which it did not seek to abolish, but it was so far influenced by the philosophic idea of natural equality that it set itself to minimize an evil which it could not cure. There was indeed one distinction which in the event became a distinction of importance. The Stoic philosophy was strictly universalist in character. For the Stoic all men were brothers and there was no distinction of nationality, class, or creed. For the Church all men ought to be brothers, but many men were, unfortunately, unbelievers, and the brotherhood of men was for many purposes limited to members of the Church. Thus it followed naturally from Christian principle that the holding of Christians in slavery, and still more the reducing of Christians to slavery by capture or by purchase, were actions which, if not wholly illegal, were contrary to the best religious teaching. Accordingly from an early period the custom of enslaving prisoners of war began to be abandoned, at any rate in war between Christians, while the Church further set itself energetically to combat the traffic in slaves.[1] The custom of treating the slave as a fixture on the estate, which in the Empire had been made matter of legal enactment, was first adopted by the West Franks among the barbarians, and spread from them to other peoples by degrees.[2] The prohibition to enslave captives is treated by Gregoras as the traditional law "not only of the Romans and Thessalians, but of the Illyrians, Triballi and Bulgarians on account of the

[1] For example, the Bristol slave trade was suppressed by Wulfstan, Bishop of Worcester, towards the close of the eleventh century. It had been prohibited previously by Ethelbert and Canute, and again by William the Conqueror. The selling of a countryman beyond the seas was forbidden in the "Dooms" of Ina, and the same prohibition, so far as Christians were concerned, in the "Dooms" of Ethelred. (Pollock and Maitland, i. p. 35.)

[2] Schröder, p. 219.

unity of faith."[1] But as this prohibition did not apply to pagans, until the conversion of the Slavs it left them as the one source open to the Western European countries for the acquisition of fresh slaves whether by capture or by traffic. The interval before their conversion lasted long enough, and this source of slaves was during that time sufficiently important to alter the European name for the institution. The former "servus" was now accurately represented in mediæval and modern language by the "serf"; a "Slav" was, with slight modification, in German, French and English, a "slave."[2] As the Slavs became converted to Christianity this source of recruitment for the slave class was cut off. There remained debt slavery, the sale of wife and children by husband and father, and the sale of a man by himself in time of need. All these sources of slavery remained in the earlier Middle Ages,[3] but they were already in process of decay. Self-enslavement was a desperate resource to which men were only driven in times of great need, and probably became infrequent in proportion as a more settled order made years of famine rarer; and the downfall of free men tended rather to swell the class of serfs than of slaves. The sale of men was on the whole opposed by the Church,[4] and debt slavery was also limited under religious influences. From the Carolingian age onward it became limited to a period necessary for the paying off of the debt,[5] and thus ceased to be a source of hereditary slavery properly so-called. Meanwhile the Church was also urgent in pressing the claims of manumission. The grounds for this are based on the broadest Stoical principle by Gregory the Great, who urges that "it is a good deed if men, whom nature created and brought forth free from the beginning and the law of nations has put under the yoke of slavery, are by

[1] See Grotius, book iii. chap. ix.

[2] In addition to possible sources of capture by war there was the slave trade in the hands of the Jews. (Schröder, p. 459, quoting T. Waitz, 5, ii. 207.)

[3] Schröder, p. 220.

[4] For example, at the Council of Coblenz, in 922 (Viollet, 311); and Wulfstan again is prominent with protestations against the enslavement of "cradle children." Nevertheless, the Church allowed a man to give himself up along with his wife and children as slave to an abbey, at any rate until he could redeem himself. (Schröder, p. 220, note 26.)

[5] See Schröder, 220, compared with 459.

the benevolence of a liberator restored to their liberty in that natural condition in which they were born." This is the full doctrine of human rights applied in somewhat halting fashion by way of recommending a beneficent practice. But however haltingly applied, the moral conception of universalism, introduced by the Stoic philosophy and favoured with limitations by the Church, was in principle fatal to slavery. That institution depends, as we have argued throughout, upon group-morality and the distinction between man and man. It is suited to the genius of primitive religions, whether in the form of separate family cults or of national creeds, but it is opposed in spirit to any doctrine which teaches that the same moral obligations must apply to all humanity alike. The Stoics first preached this doctrine with effect in Western Europe, but unfortunately, in applying it to the case of the slave, they were hampered by their view of the indifference of all outward circumstances, and preached that the slave in his slavery could be and should be as truly king and lord of himself as the Emperor on his throne. The slave Epictetus was no less his own master than the Emperor Marcus Aurelius. The leaders of the Church accepted the principle of human brotherhood, but to them also worldly institutions were secondary, because salvation, if obtained in this world, was not obtained for this life, but for the life to come. They dealt with slavery, therefore, not so much from the point of view of the rights of the slave as from that of the duties of the master, and limiting their conception of equal rights by the principle of brotherhood in Christ alone, they took less account of the fate of those outside the Christian community. The results are written deep in history. The question is always asked how far the abolition of slavery in Europe was due to moral, how far to economic, causes. The answer appears to be that, so far as regards slavery proper, the two factors worked in harmony. The transition to serfdom was favoured by the economic situation.[1] But the disappearance

[1] See Vinogradoff, *Growth of the Manor*, pp. 202–204. A great social reform like the abolition of slavery is seldom brought about by moral agencies alone. It is only when these can take advantage of a favourable political or economic situation that they get their way. Hence there is always on the surface of things colour for the cynical view that what appear to be moral improvements are really due to non-moral causes. But this

of slavery is no less distinctly connected with the rise of universalism in ethics, first in philosophy and afterwards in religion. In neither form was the institution of slavery directly combated, but the indirect effect, first by ameliorating the position of the slave and thereby curtailing the rights of the master, secondly by encouraging manumission, and thirdly and most important of all by cutting off the sources of supply, was that slavery died of inanition, and by the end of the twelfth century was almost unknown in Europe. On the other hand, when the Christian world came into contact a century or two later as a conquering power with non-Christian races, there was no moral force at hand to resist the natural result and new forms of slavery grew up.

12. The history of serfdom in the Middle Ages is more complicated and obscure, especially as to the causes and progress of its disappearance. We have seen a form of predial serfdom already growing up within the Roman Empire. We have seen also that, in addition to the slave class, the barbarian conquerors introduced into the constitutions of Western Europe imperfectly distinguished classes of semi-free citizens. All these elements contributed to form that great mass of the population which throughout the Middle Ages stood between the free man and the slave, and whilst slavery, as we have seen, was slowly dying out, serfdom for a long time continued to flourish and increase, recruited in part from the ranks of the slaves and in part from free men who, either by conquest or through economic causes, sometimes even by voluntary surrender of their freedom with a view to gaining the protection of a lord, swelled the number of the semi-free. Thus mediæval serfdom represents, on the one hand, a progress from slavery, and, on the other hand, a degradation of free men which is a not uncommon incident of epochs of unrest and of military conquest. It is not within our limits to characterize

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view ignores the cases in which the political and economic forces tend in the opposite direction. In modern industry, for example, the circumstances, if we eliminate the moral factor, are eminently favourable to the development of a servile system, but every move in this direction has constantly been combated, on the whole with conspicuous success, by the deliberate efforts of men and women animated by a sense of justice and humanity.

all the different grades of unfreedom which resulted. At most a general idea may be given. Serfdom, though not essentially and universally confined to peasants settled upon the land, tended in point of fact through the Middle Ages to lose its domestic and assume a territorial character. In the Frankish Empire the serf was, generally speaking, *glebæ adscriptus*. He might not leave his land, while on the other side he could not be sold apart from the land. He could acquire property, but had not complete control of it. He had to perform certain definite services to his master, which could not be altered arbitrarily, and in the earlier period he required the lord's consent to marriage, at any rate outside the domain, while he had also to pay for securing the lord's consent. He came under the protection of the law, having as a rule half the wergild and half the fines of a free man. In other respects, the position of the serf was extremely different among different peoples. Among the Saxons the Liti were a part of the people. Among the Frisians, and probably among the Saxons also, they could plead in court, and in cases of injury received a part of the wer themselves, only one portion going to their lord. Among the Lombards, on the other hand, the corresponding class could not appear in the courts, and the lord received their wer as though they were slaves. Between these extremes there were numerous intermediate grades.[1] As the Middle Ages advanced the heaviest burdens of serfdom tended to disappear in the Empire. In particular the right to marry was acquired by the serf, and here, as has been mentioned in Chapter V., the influence of the Church was probably decisive. The payment upon marriage, however, was continued, at any rate in cases where it took the bride off the estate, and in this case it still required the approval of the lord—not that the withholding of such approval would invalidate the marriage, but that it would render the parties liable to punishment.[2] The old right of the lord to inherit from the serf had been reduced[3] to the right to a duty on the inheritance; and the other restrictions on the serf's right to property were in process of disappearance. His personal tribute was converted into a rent upon his holding and his stock, and the

[1] Schröder, 222, 223.
[2] *Ib.*, p. 455.
[3] "*Schon in der vorigen Periode*"; Schröder, *ib.*

limitation upon his power to alienate his land into a right of pre-emption on the part of the lord.[1] Finally, the growth of free cities favoured freedom. The serf, escaping to them, could be reclaimed by his master within a year and a day, but from that time onwards was free. The principle "Air makes free," that is to say, that the position of a person follows the general law of the land on which he is settled and does not depend upon his birth, became adopted in the later Middle Ages and naturally tended to emancipation.[2]

In France the conditions of serfdom varied from province to province and from period to period.[3] A conception of the different grades of unfreedom covered by the term may be derived from the description given at the close of the thirteenth century by Beaumanoir. In one grade the whole property of the serf was at the mercy of the lord, who might also imprison him at pleasure; in the other grade, the lord could command nothing from the serf except a fixed customary sum, though he was still the serf's heir unless the children redeemed the succession.[4] Serfdom had already become rare and had in some provinces disappeared. Some serfs gained the right of paying a fixed "taille," and the right of holding and transmitting property were, generally speaking, acquired early. In a mediæval decision given at Paris the characteristics laid down as distinguishing a serf are (1) he cannot marry without the permission of the lord, and (2) he cannot give or bequeath goods. The second condition was the more general, and the milder form of serfdom persisted to the eighteenth century.[5]

In England, as elsewhere, serfdom was increasing just at the period when slavery was disappearing, and the number of serfs was swelled by the merging of different classes, slaves, villeins, and even free men, under a single denomination. The serf was not properly speaking *adscriptus glebæ*, although he passed with the manor when it was sold or inherited; but he could be moved from place to place and from one service to another at

[1] Schröder, p. 456.
[2] *Ib.*, p. 460. On the re-action which began in the fifteenth century, and which was due largely to the unfavourable economic position of the landless free labourers, see Schröder, pp. 460, 461.
[3] Viollet, pp. 307, 313, ff.
[4] *Ib.*, p. 314.
[5] *Ib.*, p. 315.

the lord's will,[1] and by strict right could be sold, though the right was rarely exercised.[2] The general characteristics of the villeinage were that the villein by birth could not marry his daughter without paying a fine, nor permit his son to take holy orders, nor sell his calf or horse; that he is bound to serve as a reeve in the manor, and that his youngest son succeeds to his holding on his death.[3] To this it must be added that while the serf has full legal rights in relation to third parties, the criminal law makes a great distinction between his lord and him. Thus in the *Leges Henrici* if the lord takes away the man's land or deserts him in mortal peril he forfeits his lordship, but the man must bear with the lord's ill-treatment of him for thirty days in war and a year and a day in peace. To kill one's lord is like blasphemy and is punishable with death by torture, whereas if a lord kills his man without cause a fine will suffice. This is the "high-water mark of English vassalism."[4] The Norman law is more liberal, but still draws a distinction. "If a lord kills his man he shall be punishable with death, if the man his lord he shall be drawn and hanged, and even if it be by misadventure he shall be punishable with death." The lord would be punished for killing or maiming the villein, but might beat or imprison his serf.[5]

The history of the decline of serfdom in the later Middle Ages, both in France and England, is not very clear. The lawyers who had been unfavourable to freedom down to the thirteenth century changed their attitude during that period under the influence of the new ideas of the State as a whole, no longer broken up into half-independent feudal territories, but, as a single authority, having equal claim upon all its subjects alike.[6] That these more enlightened ideas accompanied the improvement of social organization was an extremely fortunate circumstance for the English serf. In England, as on the Continent, freedom might be acquired by escaping from the lord's jurisdiction, and the courts now favoured liberty. Feudal barbarism admitted this rough and ready method of emancipation largely because it lacked the means of securing the person of the runaway. With the growth of the

[1] Vinogradoff, *Villeinage in England*, p. 57.
[2] *Ib.*, p. 151.
[3] *Ib.*, p. 156.
[4] Pollock and Maitland, i. p. 300.
[5] *Ib.*, i. p. 416.
[6] Vinogradoff, p. 131.

kingly power and the better settlement of society, this primitive check upon oppression would naturally disappear, and thus where the ethical conception of freedom was wanting, the growth of civilization meant the prolongation of the old bondage and even, as in Russia and Germany, deterioration in its character. In England and France, upon the other hand, there was something of the nature of an ethical resistance to any tightening of the bonds, and thus the development of order had a beneficial effect on the slave rather than the reverse, for it tended to encourage the system of money payments as a substitute for labour service, and though in theory the serf remained the lord's man, yet in practice, in proportion as labour services were commuted for a money rent his position became scarcely distinguishable from that of a tenant farmer. From whatever causes, servile tenure was in fact rapidly becoming obsolete during the fourteenth century. One of the latest records we have of the existence of bondmen in England is in a document in which Elizabeth enfranchises some remaining serfs of the Crown in 1574,[1] but there were Scottish miners who remained serfs down to 1799 and were not particularly desirous of having their condition changed.

Yet elements of servility remain in the position of the labourer. The Statute of Labourers in 1348 was passed in the intention of preventing workmen from taking advantage of the rise in wages due to the depopulation of the country by the Black Death, and was the beginning of a series of labour laws which brought the labourer into a position which as described in Blackstone stood as follows:—(1) The law first of all compels all persons with no visible effects to work; (2) defines their hours in summer and winter; (3) punishes those who desert their work; (4) empowers justices to fix the rate of wage for agricultural labour and punishes those who give or exact more than the wages so settled.[2] We know that these laws were largely a dead letter. Nevertheless they illustrate the attitude of the governing classes. What was in practice more important was the Statute of Apprentices (Fifth of Elizabeth), which restricted the right to carry on a trade to those who had served an apprenticeship, while

[1] This is sometimes spoken of as the latest record, but Prof. Vinogradoff informs me that this is not absolutely correct.

[2] I., p. 414.

the operation of the Poor Law, especially of the Act of Settlement, tended in practice to restrict the motions of the English labourer almost as much as regular serfdom would do.[1] Indeed had this statute been rigidly and universally carried out, it would have had the effect of fixing the labourer in his parish like a predial serf without the right upon the land which redeems the serf's position. To describe its practical operation in these terms might savour of exaggeration, yet the historian of the Poor Law declares that with this Act the "iron of slavery entered into the soul of the English labourer," and those who know the midland or south country labourer of the present day can see the scar still there. Again, Blackstone writes:—

"A master may by law correct his apprentice or servant for negligence or other misbehaviour, so it be done with moderation; though if the master's wife beats him, it is good cause of departure. But if any servant, workman or labourer assaults his master or dame he shall suffer one year's imprisonment and other open corporal punishment not extending to life or limb."

Further, in Blackstone's time a servant through whose negligence a fire happens forfeits £100, and in default of payment might be committed to a workhouse with hard labour for eighteen months. It is not difficult to recognize in these distinctions between the rights of master and servant an echo of the law as to lord and serf.

Nor was the English law altogether free from caste distinctions in the earlier part of the modern period. The benefit of clergy, which had originally been an immunity claimed by ecclesiastics

[1] In the effort to deal with vagabondage the law has at different times come perilously near to re-introducing slavery. A statute of Edward VI. ordained that all idle vagabonds should be made slaves, fed on bread and water and refuse meat, wear iron rings, and be compelled by beating, chains, etc., to do the work assigned to them. This was repealed in two years. It is now laid down that slaves acquire freedom by landing in England, but this does not affect the right a master may have acquired to a man's perpetual service, and "the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, was totally without foundation." The Law of England will not dissolve a civil obligation between master and servant on account of the alteration of faith in either of the parties, "but the slave is entitled to the same liberty in England before as after baptism; and, whatever service the heathen negro owed to his English master, the same is he bound to render when a Christian." (Blackstone, i., 412, 413.)

from the secular courts, had been gradually transformed into a mere class privilege, whereby educated persons could escape punishment for secondary offences. Thus in the seventeenth century the question whether a man would be hanged for larceny or not depended on whether he could read, unless indeed he had forfeited the benefit of clergy by contracting a second marriage or by marrying a widow. In 1705 the necessity for reading was abolished, and benefit of clergy could thereafter be claimed by all persons alike for a first offence in the case of secondary crimes. But important distinctions were still made. The offender, unless he was a peer or a clerk in orders, was, until 1779, branded in the hand and liable to seven years' transportation. Clerks in orders, on the other hand, might plead their clergy for any number of offences, and peers had received the same privileges as clerks by the statute of 1547. On the other hand, during the eighteenth century benefit of clergy was gradually withdrawn from an increasing number of offences, but it was not until 1827 that it was finally abolished, and even then it was doubtful whether the privilege of peers fell with it. This question was not settled until 1841, when the statute of Edward VI. was repealed, and peers accused of felony became liable to the same punishments as other persons.

When it is remembered, further, that the whole administration of petty justice and of the preliminary process in graver crimes was in the hands of the landed gentry, upon whose estates the labouring classes, rendered landless by economic changes, were fixed, as has been shown, by the Act of Settlement, when it is further borne in mind that the same justices had the power of fixing wages, and that the whole of the working classes in the country were always upon or over the verge of pauperism and dependent upon the support of the poor law, the control of which was substantially in the same hands, it will be recognized that the nominal freedom of the English labourer down to the beginning of the reform period was a blessing very much disguised, and that the reality compared unfavourably with the lighter forms of serfdom. The first stages in the progress of the factory system made matters even worse. The new demand for child labour introduced for a period what was in essence if not in name a form of child slavery, pauper children being regularly

imported in the manufacturing districts as apprentices and set to work under conditions as to hours and also as to housing which would have been onerous even at less tender years. But these abuses, when fully realized by the public, were met within a period of time which, in comparison with the normal slowness of reform, may almost be called brief, by a series of legislative measures, overriding the so-called freedom of contract, and protecting the children from their legal guardians. The factory system, in short, reproduced the economic conditions under which, in other circumstances, a form of slavery would have arisen. And from this result England and the other industrial nations with it have been saved by a distinctively ethical movement.

Upon the Continent the direct manumission of serfs was perhaps more frequent than in England. Enfranchisements *en bloc* were common. We even hear of such things being done by abbeys. St. Benedict of Aniane in the ninth century emancipates serfs on the land which he receives.[1] Charters were sometimes given upon payment to whole villages and by kings to whole counties. In 1315 Louis X. invited all the serfs on the Crown lands to purchase their liberty, but the price asked was too high. A general abolition of personal serfdom was demanded by the Third Estate at Blois in 1576, and again at Paris in 1614. This was not granted, but the institution was quite unknown in many provinces in the seventeenth century. It remained in Franche-Comté, Bourgogne, Alsace-Lorraine, Trois Évêchés, Champagne, Bourbonnais, La Marche, Nivernois, Berry; but the burden was relatively light, and when the Duke of Lorraine proposed a money commutation for their services in 1711, the serfs who were to benefit by it themselves raised objections. The question was raised by Voltaire, and by an edict of 1779 Louis XVI. enfranchised the serfs of the royal domain and encouraged general abolition. Serfdom was finally abolished in France without compensation on the night of August 4, 1789, along with the other incidents of feudal tenure. At the same time fell the whole system of privileges which had made the nobles and the clergy castes set apart from the mass of the people.

[1] Ingram, *op. cit.*, p. 93.

In the German Empire the progress, which we have seen going forward until the thirteenth century, was arrested in the fifteenth, and a re-action took place, leading to the peasant war at the time of the Reformation. Serfdom lingered on, but in 1719–20 it was abolished on the Crown lands of East Prussia by Frederick William I. Frederick the Great attempted to forbid corporal punishment and aimed at a general emancipation, but achieved little except in Prussian Poland. The liberation of the German serf was to come indirectly from the French Revolution. Napoleon carried out emancipation in the conquered territory, and as part of the general preparation for resistance to France, the Prussian statesmen issued an edict in 1807 by which the whole population of Prussia was made free by a stroke of the pen.[1] Serfdom admitting arbitrary exactions and corporal punishment remained, notwithstanding the efforts of Maria Theresa and her successors, in a great part of the Austrian Empire down to 1848. It was abolished in Russia in 1861. The emancipation of the Russian serf may be taken as the final termination of the enslavement by law, whether complete or partial, of white men. The later stages of the process in the more backward countries were thus clearly deliberate acts of government, based upon general conceptions either of human rights or of the conditions of social well-being. And on the whole the continental serf gained something through the delay. Emancipated in England more by economic causes than on ethical principles, he tended to become a landless labourer, more abject in some relations than a serf with defined rights. On the Continent in most countries he retained his land, subject to servile restrictions, and when the ethical movement struck off his chains, it left him a free peasant cultivator. In England his practical freedom was to be won at a later date and at the cost of a depletion of the rural districts, which is raising the agrarian problem in a form elsewhere unknown. So much depends on the nature of the causes determining a change like that from servitude to freedom, however great the inherent importance of the change itself.

13. The abolition of slavery and serfdom in the modern world

[1] Ingram, *op. cit.*, pp. 119-129.

may, from one point of view, be described as a process whereby the obligations of group-morality were extended so as to cover all Christians, or at any rate all white Christians. Unfortunately, this result is not the same thing as a strictly universalistic morality. As long as the Christian communities lived in isolation and did not come into touch with weaker races as their conquerors, the matter was not one of any very practical moment, but when, with the discovery of a new world and the circumnavigation of Africa, a fresh economic position arose, making slave labour industrially advantageous, while at the same time a vast black population was put at the disposal of the far stronger white man, slavery grew up again in a new and, in some respects, a more debased form. It is worth noting, as illustrating the ethical principle involved, that the old Roman slavery had never entirely disappeared. In the eleventh century we find Gregory VII. exacting from Demetrius of Dalmatia a promise not to sell men. There was a slave trade with Mussulmans in Venice and in Sicily right through the mediæval period. In the twelfth century slaves were sold at fairs in Champagne, and Saracen slaves were found in the south of France in possession of a bishop at that period.[1] Though the French law in the sixteenth century recognized that no slave could exist on French soil, the maxim, as formulated by Loisel, is applied to those who enter France only upon their being baptized. But these smouldering embers of slavery were now destined to burst out into flame. The Portuguese began importing negro slaves in 1442, and obtained a bull sanctioning the practice from Pope Nicholas V. in 1454. The reason was characteristic. A great number of the captives had been converted to the Catholic faith, "and it is hoped that by the favour of the divine clemency, if this process is continued, the nations themselves may be converted to the faith, or at any rate the souls of many from among them may be made of profit to Christ."[2] In fact, the hope—probably the quite sincere hope—of saving souls paralyzed, to say the least, the protest which

[1] So at Narbonne and in Provence in the thirteenth century, and in Roussillon down to its annexation by France. A Saracen was publicly sold in 1296. (Viollet, pp. 329, 330.)

[2] Viollet, p. 330.

would otherwise have been made against what was in essence a revival of one of the worst features of barbarism. It was quite a logical exception made by Pope Calixtus III. in 1456, when he prohibited the enslavement of Christians in the East, and by Pius II. in 1462, when he severely blamed Christians who enslaved negro neophytes. When Columbus shipped 500 Indian prisoners to Spain to sell as slaves, the law of the case was investigated by Isabella, and, theologians differing in their view, she finally ordered the Indians to be sent back to their homes.[1] Meanwhile, in the New World the Spaniards were making slaves freely of Indians and treating them with great cruelty. Las Casas, impressed with the horrors which he saw, was struck with the idea that negroes would endure that bondage without sinking under it, and with the most benevolent intentions gave the most unfortunate advice that residents in Hispaniola should be allowed to import negro slaves.[2] Regular black traffic accordingly began, notwithstanding successive efforts made by the Popes, when they grasped the situation, to suppress it.[3] All the great trade nations of Western Europe joined in the traffic, and must share the blame alike. Europe itself was not preserved whole from this scourge. In England, indeed, it was held in the case of the negro Somerset (1772) that English soil emancipated, but this doctrine, which had been good law in France in 1571, was suspended in 1716 and again in 1738. Slaves became common, and were even sold at Paris down to 1762. From the sixteenth to the eighteenth century the Popes themselves had Turkish galley-slaves, and Louis XIV., besides these, had Jewish slaves and Russian captives.[4]

This second slavery was put down by a distinctly ethical movement. It began with the Quakers in the seventeenth century. George Fox had already desired the Friends in America to treat their negroes well, and "that after certain years of servi-

[1] Ingram, 142, 143.

[2] "Which advice," says Las Casas himself, "after he had apprehended the nature of the thing, he would not have given for all he had in the world." (Ingram, 144.)

[3] *E.g.* The Bull of Urban VIII., 1537, and of Benedict XIV., 1741 (Viollet, p. 331.)

[4] Viollet, p. 332. The position of slaves in France and her colonies was minutely regulated by the Code Noir of Louis XIV., 1685.

tude they should set them free." In 1727 the Society declared that slavery was not an allowed practice. In 1761 they excluded from membership all concerned in it, and in 1783 formed an association for liberating negroes and discouraging the traffic. The Pennsylvanian Quakers had condemned it from 1696 onwards. Many leading names in English thought are quoted in Dr. Ingram's History as opponents of the slave trade from the end of the seventeenth century to that of the eighteenth. Among them are Baxter, Steele, Pope, Cowper, Day, Hutcheson, Wesley, Whitefield, Adam Smith, Johnson and Paley. An English Committee for the abolition of the slave trade was formed in 1787, and the motion for abolition, which was defeated in the House of Lords in 1794, was carried under Fox's premiership in 1807.[1] The French Revolution had gone further. In 1791 the old principle that the French soil emancipates was re-asserted by the Convention, and in 1794 slavery in the French colonies was abolished by decree. But the moment was ill chosen, as Hayti was in revolt, and Napoleon restored slavery in 1802. At the Congress of Vienna, British influence was active in obtaining the consent of other nations for the suppression of the slave trade, and France acquiesced, in the treaties of 1814 and 1815. The British and Foreign Anti-Slavery Society was founded in 1823, and secured Abolition ten years later. Slavery was abolished by France in 1848, by Portugal in 1858, by the Dutch in 1863, and by Brazil in 1888. The founders of the United States had been opposed to slavery and attempted to exclude it by the Constitution, but were defeated by the opposition of South Carolina and Georgia. An Abolition Society was formed in 1774 and re-constructed by Franklin in 1787. The Northern States adopted measures for abolition between 1777 and 1804, and importation was prohibited by the United States in 1807. An Anti-Slavery Society was founded in 1833, and at the cost of civil war emancipation was proclaimed in 1863.[2] Unfortunately, the legacy of slavery remains in the Southern States, taking, on the one hand, the form of the most horrible personal cruelties which disgrace any nation claiming to be civilized, and on the other hand, the

[1] The trade had been abolished by Denmark in 1792.
[2] Ingram, 154–182.

efforts to re-introduce slavery by a side wind through the corrupt use of the criminal law.

14. Slavery is no longer admittedly [1] practised by any white nation. On the other hand, the problem of dealing with coloured labour has not been yet satisfactorily solved. Here and there "forced labour" has been allowed, and forms of contract labour are common, which, to say the least, are difficult to keep free from every servile taint. The questions raised by the various forms of contract allowed by the British and other civilized governments since the abolition of slavery belong, however, rather to the controversies of the moment than to the historical study which is the object of the present work, and I do not propose to discuss them here. It may, however, be allowable to say that the modern tendency to the concentration of wealth, or at least of the forces directing labour in a few hands, taken in conjunction with the vast reserves of cheap labour to which access has been given by the opening up of China and the African continent reproduce in very essential features the conditions out of which great slave systems have arisen in the past, and the temptation to utilize the cheap and relatively docile labour of a weaker and perhaps a subjugated race against the well-organized battalions of the white artisans, is one by which leaders of industry, being human, cannot fail to be attracted, and therefore raises possibilities which no statesman can ignore.

The result of this brief review is to show that the principle of the equality of all classes before the law can hardly be said to have been accepted by the Western world as a whole before the revolutionary period. The whole structure of mediæval society had been based upon the principle of subordination and was moulded in the spirit of caste. Confronted at all times with the doctrine of Christian Brotherhood, and, later on, with the principle of natural equality, this structure was also undermined by the growth of industry and the complex forces, ethical, political, and economic, which transformed the feudal kingdom into the organized state. Under these influences slavery proper disappeared as we have seen in the course of the twelfth century; and in the most advanced nations serfdom followed it in the

[1] Not even by the Congo State.

period between the thirteenth century and the sixteenth. But for the completion of the work fully two more centuries were required. In the less advanced countries serfdom itself lingered on into the nineteenth century. In France, though caste privileges grew more and more out of harmony with the spirit of the time, they could only be destroyed by a revolution. In England, where they were rather a practical consequence of political superiority than the express subject of legal enactment, they yielded later but more peacefully to the influences of the Reform period. So modern is the change whereby law and public institutions have turned towards equality rather than subordination as their ideal. An ideal such equality must perhaps always be. Wealth and influence will always have their weight, not only in social life, but in the business of government and even in the administration of justice. Yet the true spirit of caste is gradually being reduced to a shadow of its former self. Expelled by slow degrees from the sphere of law and government, it has been left to amuse itself with a mock kingdom in the region of ceremonial and social intercourse, in which the ghosts of by-gone realities keep up a mock state for the amusement of the philosopher.

As long as class, racial, and national antagonisms play a part in life we cannot say that group-morality has been altogether overcome. Nevertheless, the evolution sketched in the present and preceding chapter is of no small significance for ethics. At the outset men are organized in small groups bound to mutual aid and forbearance, while they are indifferent or hostile to outsiders. There is no organic bond uniting humanity as a whole. Hence the captive enemy and, in principle, unless there are special reasons to the contrary, the peaceful stranger are "rightless." But by degrees a wider conception of obligation arises. Fellow-Greeks, co-religionists, fellow-white men, ultimately fellow-men, enter the circle to which obligations apply, and even the violence of conquest is limited by the rights attaching to the conquered as human beings. The "group" is thus widened till it includes all humanity, at which point group-morality disappears, merged in universalism. But the rights first recognized are those of the person. To take into account the rights of the organized community is a further step, following logically from the first, no doubt, but following slowly. Here too

we recognize a slow advance in the civilized world, an advance which, if unimpeded, would finally overcome the "group-morality" of nations in favour of a true internationalism of morals and law.

Turning next to the internal composition of the community, we saw that the primitive group was relatively small and homogeneous. But as society grows divisions come, and a new form of group-morality arises—distinctions of high caste and low caste, bond and free, and the like. In engendering, accentuating and maintaining these distinctions, military conquest, economic inequalities, religious differences, race and colour antipathies, have all played their part, and up to the middle civilization social divisions probably tend to increase rather than diminish. Combated by the teaching of the higher ethical and religious systems, they have been mitigated and in large measure overcome in the modern world. Most tenaciously maintained where the "colour line" is the outward and too visible symbol of deep-seated differences of race, culture, character, and traditions, they are countered even here by the fundamental doctrine of the modern state that equal protection and equal opportunity are the birthright of all its subjects. Thus though the colour line is the last ditch of group-morality, here too in the modern period, taken as a whole, Universalism has made great inroads. With the improvement of communication and the growth of commerce, Humanity is rapidly becoming, physically speaking, a single society—single in the sense that what affects one part tends to affect the whole. This unification intensifies the difficulties of ethics because it brings into closer juxtaposition races and classes who are not prepared by their previous history to live harmoniously together. Hence it is not surprising that law and morals do not show a regular, parallel advance. Nevertheless the upshot of the evidence here reviewed is that, ethically as well as physically, humanity is becoming one—one, not by the suppression of differences or the mechanical arrangement of lifeless parts, but by a widened consciousness of obligation, a more sensitive response to the claims of justice, a greater forbearance towards differences of type, a more enlightened conception of human purposes.

CHAPTER VIII

PROPERTY AND POVERTY

1. Among primitive peoples there is little scope for the institution of private property. Land, as we shall see more fully later on, is held in common, and apart from land and its produce, such peoples possess little which can be appropriated, except their small personal belongings. These, it would seem, belong to the individual from the first. Indeed, tools and weapons are so completely identified with their owner, that they are very frequently buried with him, and that on one of two grounds—either that he may use them in his future life, or because as belonging to a dead man they are regarded as dangerous and are therefore best done away with. Now the recognition of individual property in personal belongings and of communal property in land and its produce may both be explained as resting on one and the same principle—the principle of occupation and use. It is the individual who actually carries and handles the spear or fishing-net, the family or the tribe which actually occupies and hunts over the land. Thus we may provisionally accept the view that property in its early stages is based on occupation and use, and cannot be dissevered from them. But with the destruction of the dead man's belongings we touch on another conception, which we must allow for at very low, perhaps at the lowest, stages. Among many rude peoples the statement that property depends upon user must be qualified by the exception that it may also be secured by taboo. This is probably the explanation of the extreme scrupulousness shown by some savages in regard to the belongings of others. Thus, among the Kunama, Dr. Tylor remarks that a hedge may be mended by a cotton

thread.[1] That would certainly not do in the civilized world. But then the civilized man does not fear that death will follow from a breach of the fence as a magic result. In Oceania,[2] where taboo reaches its extreme development, it is freely used for protection of property, real and personal. In ancient Babylon boundary stones were secured by an imprecation,[3] that is to say, a curse was laid upon them which would fall on those who should remove them. The heap of stones which Jacob and Laban set up were to be witnesses between them, and it is possible that here too the power to punish the transgressor was conceived as lying within the stone itself; while at a later stage, in accordance with the regular development of religion, the curse was laid upon him who moves the stone by Jehovah. When we read of the Western Esquimaux, whose honesty is highly praised by travellers, that other people's goods left about with a stone placed over them are quite secure, we can hardly avoid wondering whether this is due to simple honesty of character or to the magic qualities of the stone.

Thus the legal conception of user may be reinforced by the magical idea of taboo as a basis of property. But—whether owing to the irregular development of the latter conception or not—we have next to observe that the regard actually paid to rights of property is a very fluctuating quantity in the less civilized world, and the moral attitude to the whole matter differs seriously from that of more developed races. We cannot, indeed, speak in general terms. Some savage peoples get a very good character from travellers for honesty, while others are severely condemned. This condemnation, again, sometimes refers merely to their habit of stealing from other tribes or from strangers, and this, as we have seen, hardly counts. Strangers have no rights, whether of life or property, except in so far as protected by the law of hospitality. Thus among the Red Indians the guest was safe while under the roof of his host, but might be freely robbed in the prairie.[4] The real question, therefore, is how far the rights of property are recognized within the tribe. As to this we find very divergent statements, and

[1] Tylor, *Contemp. Review*, April 1873, p. 704.
[2] Ratzel, *History of Mankind*, vol. i. p. 285.
[3] Maspero, p. 762.
[4] Waitz, vol. iii. pp. 129, 130.

sometimes much difference between nearly allied peoples Thus among the Nagas,[1] in some tribes theft is punishable by fines, beating, and even death, but in two of the tribes it is not considered disgraceful at all. In some peoples successful theft is held as by no means dishonourable. The case of Autolycus has been referred to in Chapter I. Among some of the Esquimaux theft when discovered is merely held a clever trick;[2] among the Balantes in Africa it is held honourable, while among the Kaffirs the children of chiefs may steal within their own tribe.[3] Even in some civilized or semi-civilized communities, as at one time in ancient Egypt, we find a recognized organization of theft under constituted authorities, who duly restore the property to the owner on payment of a portion of its value.[4] Further, the distinction so frequent in early law between the manifest and the non-manifest thief—that is to say, between the thief taken in the act and the thief who has got clear away—probably points to a time when the successful thief was rather admired for his skill than condemned for dishonesty, and possibly acquired, or might at any rate confer, a title to the goods.[5] This same distinction illustrates a further point. The tendency of early law is, as will be understood from the discussion in Chapter III., to treat theft like other delinquencies, from the point of view of vengeance rather than of justice. The owner, surprising the thief in the act of carrying off his goods, will naturally attack, and will very likely kill him. If so, who, on primitive principles, can blame him? But if he does not come up with the thief, but finds out the robbery in cold blood, then he ought to control his vindictive feelings, and be thankful if custom allows him to get restitution,

[1] Godden, *J. A. I.*, 26, *op. cit.*, p. 174.

[2] Waitz, vol. iii. p. 309.

[3] Post, *Afrik. Juris.*, vol. ii. p. 83. Similarly there was a class of privileged thieves in Ashanti.

[4] In Abyssinia thieves are organized under a chief who pays tribute. (Post, *loc. cit.*) Waitz (vol. ii. p. 218) mentions that in some parts of Africa the thief keeps half of what he steals. For the organization of thieves in Egypt, see Diodorus, i. 80, 1.

[5] See Pollock and Maitland, vol. ii. p. 497. Instances of the "receiver" being vested with ownership of movables occur in contemporary Africa. (Post, *Afrik. Juris.*, vol. ii. p. 162.) On the Congo, according to Waitz (*loc. cit.*), secret theft is held slavish, but open robbery lordly, and he states that the Kaffirs generally condemn theft, but admire it when cleverly executed. (*Op. cit.*, 401.)

with perhaps something more, for his pains. In early English law, the thief caught red-handed could be hanged without opportunity of self-defence before an impromptu court. But an action for robbery, even in the twelfth century, involved only a double restitution.[1] In the Book of the Covenant, "if the thief be found breaking in and be smitten that he die, there shall be no blood-guiltiness for him. If the sun be risen upon him, there shall be blood-guiltiness for him." The owner should not let the sun rise upon his wrath. The thief must merely make restitution. If the stolen animal is alive he shall pay double, if he has killed or sold it "he shall pay five oxen for an ox, and four sheep for a sheep."[2] The Moors, on the other hand, at the present day do not punish theft by night, but only by day, and then only when the thief is caught in the act.[3] It is clear that in such distinctions as these the law takes account, not of the right and the wrong of the case, as we should conceive it, but merely of the degree of resentment natural to the man who is wronged and of the manner in which he may be expected to appease it. Clearly, wherever the thief is allowed to keep a part of the stolen property, or has simply to make restitution, stealing can hardly be considered a wicked act in our sense of the term, and even where restitution is double or manifold, we must regard it as rather intended to satisfy the injured party than as a punishment of the wrong-doer.[4]

On the other hand, there are also many cases, even in the uncivilized world, where theft is severely punished, not only by fines, which are a form of manifold restitution, but also by beating, enslavement, mutilation, humiliating exposure, and even death.[5] Indeed, as soon as public punishments arise, it is generally punished with great severity. Thus in England an action for robbery, which only involved double restitution in the time of Glanvil, who died in 1190, was punished by death and mutilation in the time of Bracton, who died in 1268,[6] and a little

[1] Pollock and Maitland, vol. ii. pp. 494 and 579.
[2] Exodus xxii. 1–4.
[3] Post, *Afrik. Juris.*, vol. ii. p. 85.
[4] Restitution is a very common penalty in Africa. (Post, *Afrik. Juris.*, vol ii. p. 83.)
[5] Instances of all these in Africa (Post, *l. c.*)
[6] Pollock and Maitland, ii. p. 494.

while later death was the invariable penalty, even in the end for the theft of a shilling; while smaller thefts—petty larceny—were punished by whipping, pillory, or by the loss of an ear, and on repetition by death.)

The conclusion to which facts such as these point, and which, remembering how scanty the evidence is, we may tentatively adopt, is that the conception of property, even in relation to personal belongings, is somewhat irregularly developed in the uncivilized world. Where the rights of owners are very strictly regarded the cause is in many instances the fear of magic, though in some cases (as among the Iroquois and the Dakotas)[1] it may have a more decisively moral character. But in a very large number of cases, if not in the majority, we have reason for supposing that the right of property is not held morally sacred as with us, theft not being punished as theft, while in some cases stolen goods are not even recoverable. On the other hand, with the rise of a settled society, while private property in land is developing, and property in movables is increasing through the growth of the arts, the punishment of the thief is taken out of the category of vengeance; he is dealt with as a moral offender, and that with the extreme of severity.[2] This is after all only to state in special relation to property the conclusions which we reached in Chapter III. with regard to rights in general. My right to my property, like my other rights, is in the earlier stages only mine in the sense that I shall be expected to avenge its infringement by certain

[1] Cf. Schoolcraft—Drake, vol. i. p. 222. "Theft is very scandalous among them since they have no locks but those of their minds to preserve their goods." (From Coldan's account.) Among the Dakotas pilfering by women and children was common, but the men despised it as too low a practice for them. (*Ib.*, vol. i. p. 206.)

[2] In Rome the Law of the Twelve Tables—like most laws of that stage—distinguished the thief caught in the act—the *fur manifestus*—from the thief not caught in the act—the *fur nec manifestus*. The latter must make double restitution, the former is punished corporally—in the case of robbery by night or with the strong hand, by death; in other cases by beating and slavery. In the later legislation the injured party had choice of a new form of criminal action whereby corporal punishment might be inflicted, or of the *actio furti* which carried *infamia* and double or quadruple restitution. (Girard, pp. 392–394.) In the Code of Hammurabi, both death and restitution are recognized. (Sections 6 and following.) Manu prescribes fines, corporal punishment and mutilations for thefts of various kinds (viii. 319 ff.).

recognized methods. That I have a moral claim to it, which it is wicked to infringe, and not only wicked but an offence punishable by society, is a higher conception which is only perfected by degrees.

2. So far we have followed the development of the conception of property as an ethical right. The evolution in the actual conditions of ownership belongs rather to the province of the economist or the jurist. But certain points must be noted. In primitive society, as has been mentioned, private property is limited to the insignificant personal possessions, the arms and tools, etc., of the savage—while the land, the great and permanent source of sustenance, is generally common to the family or to the clan, and in the rudest forms there is not only common ownership, but—so far as the land can be said to be occupied—common occupation. A group of Australians wander over a certain area with assignable boundaries, which of course they maintain against others.[1] The Red Indians hunt a certain district, which is special to each tribe, but common to all within it.[2] Even the produce of the hunting is often common, or is distributed by fixed customary rules. All the tribes who hunt in the plains, except the half-bred Crees, are said to make common stock of the booty.[3] When agriculture begins the land is generally portioned out, at least temporarily, to the totems or the family groups within the tribe. But within the family group the produce is still common, and the land itself is still the common property of the tribe as a whole.[4]

[1] Spencer and Gillen, i. p. 8.

[2] Kohler, *Zeitschrift für vgl. Rwst.*, 1897, p. 402.

[3] Morgan, *House and Houselife of the American Aborigines*, p. 69. He adds that the tribes of the Columbia River make common stock of the fishing. Among the Western Esquimaux any one may take the game from the snares, while all large game is common. (Reclus, p. 111.) Among the South American Indians the common hunt yields common booty, but there may also be private hunting. The captor has the right to a prisoner's head, while the neighbours have the rest of him, but if the captive is enslaved he belongs to the community. (Schmidt, *Z. f. V. R.*, 1898, p. 311.) The non-agricultural tribes of Africa know no division of land. (Post, *Afrik. Juris.*, vol. ii. p. 167:)

[4] Among the Creeks each village had a common field divided into patches for each family, the harvest was conducted in common, and a certain portion was set aside for the common store out of which the needy were supported. Among the Iroquois, the land was the property of the tribe. The harvest was carried out by the joint family in common, and the

We have here two kinds of communism, a wider and a narrower, and these persist with various modifications through much higher grades of culture. We see the transition to the division of the tribal property among the households (~~in such an instance as that of the Iroquois~~), where families may possess and retain common lands by occupying them, though the land remains strictly the property of the tribe.[1] When a division is made, the allotments may only last for a short period—perhaps a year or two;[2] often, again, they depend on cultivation,[3] and if deserted the land reverts to the community. But such divisions may also become customary and periodical, so that there is a redistribution at the end of a fixed period. Or, lastly, the redistribution may be given up,[4] and the lots become family property, but the eminent rights of the community are still recognized—for instance, in customs regulating the methods of cultivation or forbidding alienation without its consent. These rights will also be found surviving in the common pasture, and with still greater persistence in the common woodland.

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products distributed by the women among the different departments; though the village did not make a common stock, the obligations of hospitality would prevent anybody from going short. (Morgan, *Houselife*, pp. 61–66.) Common cultivation and division of the harvest is also found on the Sierra Leone Coast. (Post, *Afrik. Juris*, ii. p. 172.) Sometimes the communism is of a rough and general character rather than a matter of distinct right. Among some of the Papuans, for instance, every one is expected to give when asked. "The people is God," it is irreligious to refuse anything. We see here the borderland between regular communism and the indiscriminate profusion and liberality which are such common characteristics of primitive life. (Kohler, *Z. f. V. R.*, 1900, p. 368.)

[1] Morgan, *League of the Iroquois*, p. 326. Similarly among the Yoruba, the land belongs to the tribe, but it is vested in the chief, who allots it to the householders according to their requirements, and it becomes hereditary and inalienable. (Ellis, *Yoruba*, p. 188.)

[2] This is common among the North American Indians. (Kohler, *Z. f. V. R.*, 1897, p. 402.)

[3] *E. g.* in many African tribes land is only appropriated while in use. On the other hand, land often becomes hereditary among the Foulah of Futajallon, among the Mandingos and the Somali, but uncultivated land falls back to the community. (Post, *A. J.*, ii. 169, 170.)

In the Code of Hammurabi, it would seem that leaving the land unoccupied for three years destroys the title to it as against another person who has occupied and cultivated it. (Clause 30.)

[4] Thus in India, though the lots have become inalienable, the tradition of redistribution remains. (Mayne, p. 112.) On the other hand, in the Russian Mir, the system of periodical redistribution is, according to Kovalevsky, an innovation. (*Modern Customs and Ancient Laws of Russia*, p. 93, etc.)

But while the communism of the village gradually wastes away, there is also a communism on a smaller scale which forms the economic basis of the joint family. The joint family consists of a whole group of relations connected by father-right or mother-right, as the case may be; the property of this group is generally administered by the head, but is owned and its produce shared by all in common. It is in strictness indivisible and inalienable. It can neither be sold, given away nor bequeathed. But within this communistic scheme we find private property arising in a variety of forms in very different degrees. Thus, individual members may acquire a *peculium* on certain conditions. For example, the daughter, who is allowed to retain the savings of her industry and take them away with her on marriage as her dowry.[1] Again, the joint family may break up into separate families; alienation may be allowed under varying restrictions;[2] or, finally, the house-father may acquire so much predominance[3] that the common rights are merged in him.

Without attempting to generalize as to the processes by which the village or family communism breaks up, we may leave the few points thus noted to suggest the various methods of transition that are possible, and the number of gradations whereby the system of private ownership may be approached. But we must note, further, that with the rise of the monarchical

[1] This appears to be the only form of private property in the Russian joint family down to the present day. (Kovalevsky, *Modern Customs*, p. 59.)

[2] A strong case is the Hebrew Law of Jubilee by which all land reverted to its original owners at the end of fifty years; this in effect provided that family property should not be permanently alienable. The proprietary rights of the tribe are also maintained in the priestly code by the rule prohibiting daughters who, failing sons, have inherited property, to marry out of the tribe. (Numbers xxxvi.) More commonly a right of repurchase remains where alienation has been allowed. The French right of *retrait lignager* was not finally abolished till 1790. (Viollet, p. 563.)

[3] In early Rome the family property was conjoint, but the system was much modified by the power of the Roman paterfamilias and also by the right of the heirs to demand partition at the death of the father. There was also probably a wider primitive community of land as between possibly the whole people or more probably the gens. (Girard, p. 249.)

For the varying positions of the father in the Indian household, see J. D. Mayne, *Hindu Law and Usage*, p. 222 and following. Mayne makes the distinction between the patriarchal and the joint family turn on the question whether on the death of the eldest ascendant the family do or do not remain together (p. 223). He points out that under the patriarchate all acquired property fell to the father. In this stage the head of the household acquires private property indeed, but at the expense of all the rest.

or aristocratic kingdom the communal system is apt to be qualified or superseded by some form of feudal tenure. Vassalage and overlordship replace the patriarchate or the joint family. Again, the break up of the feudal organization in the more advanced societies makes room for private ownership. But even here in relation to land there are limitations. Law or custom limits the freedom of bequest and determines the rules of inheritance, so that the apparent owner is more often than not a life tenant only. With these qualifications, however, we may consider private property in land as the general rule in the more advanced civilizations. In relation to other forms of property the emancipation of the individual is probably more rapid and certainly more complete. The importance of "stock" or "capital" becomes greater as the arts of life improve, and here, as the joint family breaks up, the individual becomes absolute owner. The evolving conception of property as an absolute personal right has full swing, and in proportion as industry and commerce advance becomes more and more a cardinal point in the common life of society.

It would appear, then, that a double process of development lies behind the modern institution of private property. On the one hand, there is the gradual emergence of the right of ownership as a right. On the other, there is the gradual extension of ownership by individuals as against ownership by families, clans, villages or tribes—an extension standing in close relation to the general break up of the primitive group and the emergence of the free responsible individual as an ethical and legal personality. It appears to be only in relatively high civilizations that private property, getting within its scope the land and—with still more completeness—the other leading means of production, becomes the dominant factor in the economic organization of society.

3. Private property, held in absolute ownership, produces a basis for the free exchange of goods, and from the exchange of goods arise commerce, the division of labour and free industrial enterprise. In its early stages society seems to know exchange only in the very rudimentary form of direct barter. A may give his cattle for B's sheep, or his sword for B's spear. Each object is handed over then and there, and the transaction is, so

to say, instantaneous. But if a regular trade is to develop, this immediate and simultaneous completion of the exchange becomes impossible. It becomes necessary to rely on the promises for the future of either one party or both, and thus exchange generates contract. But the conception of a binding contract is not reached at one stroke. To us the moral duty of keeping faith may appear axiomatic, and may seem to provide a very simple and obvious ethical basis for a legal obligation. But early law does not dig down to ethical foundations. In its primitive form it is wont to recognize no contractual undertaking at all as binding for the future.[1] It knows only those which are completed immediately on both sides, like a sale or an exchange of goods. It is a step onwards when a form is prescribed, the fulfilment of which makes the contract binding.[2] But still it is the legal form rather than the ethical element, the promise, which has force.

"That which the law arms with its sanctions is not a promise, but a promise accompanied with solemn ceremonial. Not only are the formalities of equal importance with the promise itself, but they are, if anything, of greater importance. . . . No pledge is enforced if a single form be omitted or misplaced, but, on the other hand, if the forms can be shown to have been accurately proceeded with, it is of no avail to plead that the promise was made under duress or deception. The transmutation of this ancient view into the familiar notion of a Contract is plainly seen in the history of jurisprudence. First, one or two steps in the ceremonial are dispensed with; then the others are simplified or permitted to be neglected on certain conditions; lastly, a few specific contracts are separated from the rest and allowed to be entered into without form, the selected contracts being those on which the activity and energy of social intercourse depend. Slowly, but most distinctly, the mental engagement isolates itself amid the technicalities, and gradually becomes the sole ingredient on which the interest of the jurisconsult is concentrated. . . . Forms are thenceforward only retained so far as they

[1] See Schröder, p. 63, for the Primitive Germans "wie alle Naturvölker." Post, *Grundriss*, vol. ii. p. 617 seq. Girard, *Manuel*, p. 417, on early Roman Law: "Nuda pactio obligationem non parit."

[2] For the form of the Roman Nexum, see Maine, *Ancient Law*, p. 320. The oath or the ordeal are common forms; for instances, see Post, *l. c.* A more substantial guarantee is the requirement of a deposit as among the Chinese. (*Ib.*, p. 619.)

are guarantees of authenticity and securities for caution and deliberation."[1]

Once recognized as fully binding in morals and law, the importance of contract as an element in social life increases with every step forward in civilization. At the outset its scope is narrowly limited by the social structure. As long as the old grouping remains by which a man has a fixed place as member of a clan, a joint family, a village community, he is scarcely free to enter into obligations upon his own account. He cannot bind himself without binding others, and so obligations must be entered into, if at all, between communities rather than individuals. Hence the part played by voluntary contract in life is insignificant. Again, in the earlier civilizations, rules of caste, or the inherited obligations of feudal tenure, fix each man's place and function, and greatly curtail his opportunities for entering into voluntary relations with other men. As these barriers, one after another, break down, there arises a new mobility in the social world. Instead of fellow-clansmen, or lord and vassal, bound to each other by hereditary and unalterable ties, we have merely fellow-citizens, who have no special ties but those which they form for themselves, who come together for mutual aid and, if not pleased with each other, can separate again. The old solid structure of society, in which each atom was definitely bound to its neighbours, has deliquesced into a mass of freely-moving molecules. The process is completed in the modern world by the comparative ease with which the last barrier—that of the state frontier—is overleapt. Capital migrates with perfect freedom, human beings almost as easily in proportion as alien laws have ceased to be oppressive, and the same broad civic rights are recognized in all the advanced nations. In the new structure of society it is more and more

[1] Maine, *Ancient Law*, p. 313.

For stages in the development from the nexum to the consensual contract, see Maine, *op. cit.*, p. 338. Maine points out that the moral element first enters decisively into the Real Contract where part performance or one-sided performance imposes the duty of fulfilment. Several civilized peoples recognize a right of one-sided retractation, at any rate within a certain limit of time. Thus Manu, viii. sections 222, 223. According to Post (*l. c.*) the law of Islam originally gave a right of retractation holding until the parties had separated. The ancient Babylonian seller could re-purchase by repayment with interest, and his family had a similar right. (*Ib.*)

true that the whole world is open to the individual, though it is also true that he is in a sense alone in its vastness.

4. Free contract and private property are the foundations of civilized economics, but they bring their own problems in their train. At once the cause and effect of the breakdown of the old social groupings, the accumulations of wealth which they render possible bring about new divisions, new contrasts, new antagonisms. On this side in all the more virile races their work has been combated stoutly, if not always wisely, by the best citizens and often by the religious leaders. The old communal rights are furbished up anew as in the Sabbatical year and the later year of Jubilee. The prophets thunder against those who grind the face of the poor. Exactions threatening serious diminution of the roll of citizens are met by the abolition of debt slavery, by a general cancelling of debts, perhaps by a division of lands. In particular, usury is denounced as unnatural by the philosopher or as wicked by the prophet. Religion consecrates poverty, or inspires attempts at a deliberate communism. Yet, after all, antiquity has handed on the problem unsolved to the modern world, and not only unsolved but replete with difficulties more formidable in proportion as the emancipation of the individual is more complete and the forces at the command of industrial, commercial or financial genius immeasurably greater than at any previous epoch. The sense of these difficulties has deeply affected modern legislation. There are few countries in which contracts in industrial matters are left wholly unregulated. In England in particular we have a vast mass of industrial legislation, dating back at least to the Factory Act of 1802, restricting in numerous directions the agreements which may be made between employer and employed. In quite a similar spirit agrarian legislation has often restricted freedom of bargaining as between landlord and tenant. Yet the defenders of such legislation are by no means compelled to disparage freedom of contract. They may perfectly recognize that for individuals to have the power of entering into obligations without restraint arising from their birth or status is one of the leading differentiae of the higher civilization. But they can point out that in this relation freedom has a somewhat ambiguous

meaning. The starving man may be free by the law of the land, but is not free by the law of the facts to reject the only bargain which enables him to obtain food. A contract is, in fact, never altogether free unless the parties to it are fairly on terms of equality, and they are not on terms of equality if the consequences of rejecting the bargain will be vastly more serious to the one than to the other. When economic conditions destroy this balance of equality it is held that the principle underlying free contract is rather maintained than disturbed by state regulations prohibiting contracts that are proved to be injurious to one of the parties. Thus, though—or let us rather say precisely because—"contract" is the basis of the modern social order, the character of contracts is a matter to which the State cannot and does not remain indifferent. If this analysis is correct, modern industrial legislation does not reject free contract as an exploded principle, but is rather seeking to get beneath the surface of the terms to the point where freedom is really to be found: and in this effort, the conception of free contract, it would appear, must undergo a certain reconstruction.

Something similar seems to have occurred in the attitude of legislation to the idea of private property. It is difficult to speak with certainty on a question where all the principles involved are matters of contention between rival parties, but, judging as far as possible from the trend of actual legislation alone, certain results emerge. In the first place, the modern state is committed to a wider conception of its functions than that of maintaining order or defending itself against aggression. In various directions it takes active measures for the promotion of common objects which experience has shown to be unattainable by individual effort. Of these objects some, like State education, touch the interests of the poor more directly than those of the rich, while others, like the provision for the maintenance of the indigent, avowedly benefit the poor alone. Yet it has to be recognized that if the cost of these objects were thrown by taxation on the poorer classes they would largely defeat their own purpose, by intensifying the poverty which they are intended to relieve. Modern legislation, therefore, cannot wholly escape the criticism that it tends to throw upon the wealthy the cost of measures which primarily benefit the poor. Now, to the strict

upholder of the absolute right of private property all such legislation must appear iniquitous. To him the right of the individual against the State stands on just the same footing as his right against any other individual. The right of the State to levy taxes for its own needs is indeed necessarily admitted, but this taxation is regarded as a kind of exaction, imposed by the established authority and justified only by the needs of social order and national defence. Any tampering with the possessions of one class for the benefit principally of another is mere spoliation. The defenders of the present trend of economic legislation, if they take any higher ground than that of temporary expediency, are forced in effect to question this absoluteness of private rights. Without necessarily being committed to any socialistic scheme of economic organization, they maintain that the rights of property rest upon the goodwill of society, which provides and pays for the forces necessary to maintain them and which may modify and at times has modified them in important particulars (*e. g.* in relation to inheritance and bequest). They urge, further, on economic grounds that there is a social element in value—the growth of society, its good order, the industries and exchanges which it facilitates, actually creating some kinds of wealth (*e. g.* much of the value of urban sites and of municipal monopolies), and entering as a factor into others. Even such a factor in production as good workmanship is in part attributable to the social order. The numerous intelligent, highly-skilled and steady workmen whom a modern engineer can count upon finding ready to his hand put him into a very different position to that of Watt or even Stevenson. The existence of such a class is due to complex causes, but in large measure it is attributable to the great social reforms of the intervening period, and the wealth that the class of skilled artisans create, whether it takes the form of profits to the employer or wages for themselves, has its root in social conditions which created them and were not created by them. To put it more generally, the maintenance of good social order is the condition of developed industry, and therefore of the wealth arising from it.

Now those who emphasize these social factors in value are led to question the absoluteness of the rights of private property

when urged against the State, and to contend that they should be viewed rather in relation to the social organization as a whole and defined in accordance with its needs. In this organization the individual has his place as a responsible agent, whose duty it is to do useful work and whose right it is to receive such reward as will call forth and serve to maintain his energies at their best. Society on its side has the duty of maintaining and improving the social order, and assuring to all its members the opportunity of finding their places within that order. That it may perform this duty, it has the corresponding right to a share in the wealth which it helps to create, and it does not go beyond its share as long as it leaves to energy, talent and initiative, devoted to useful ends, full scope for occupation and the stimulus of adequate reward. Such, in briefest outline, seems to be the principle underlying much of modern legislation—a principle which, it will be seen, implies a certain reconstruction of the conception of property, just as we saw above that other legislative tendencies compelled a reconstruction in the conception of contract.

5. With the growth of property and the development of trade is closely bound up the question of the treatment of those who are submerged in the process. But this opens the wider ethical question of the whole attitude of society to the helpless, the suffering and the dependent. In this relation we shall have to admit that the development of personal responsibility as shown in the growth of private property and of contract has its hardening side. The brightest aspect of primitive life is seen in its freedom of giving, its expansive and often chivalrous hospitality, induced partly by the sense of a common necessity, but certainly facilitated by communal living. In the whole department of conduct which concerns the treatment of the helpless, whether it be the aged or the infirm, the child or the stranger, the divergence of the primitive from the civilized point of view both for good and for evil is strongly marked. We have the key to the difference if we keep always in mind, on the one hand, that primitive ethics knows nothing of those rights inherent in personality upon which the civilized order is founded, but that, on the other hand, through the very absence of individual responsibility the movements of pity have free play, while, through

the prevalence of family and village communism, they have a simple and natural means ready to hand for the relief of indigence.

Both points appear in the treatment of the stranger. As such he is rightless. He belongs to no clan, and it is therefore nobody's business to avenge him if robbed or slain. He must find a protector if he would be safe. Yet if he once enters into the bonds of hospitality he is sacred.[1] Thus the stranger found outside a Red Indian camp might be treated as an enemy,[2] but once admitted as a guest he is sure of a hospitable reception. The communal living in the joint household accustomed the Indian to the habit of readily sharing what he had with those who needed it.[3] The Indian, says Morgan, "would surrender his dinner to feed the hungry, vacate his bed to refresh the weary, and give up his apparel to clothe the naked."[4] To such men the cold exclusiveness of the civilized man's house is equally astonishing and repulsive. "You know our practice," said Canassatego, an eighteenth-century Onondaga chief, to a white man, in a striking allocution which Morgan quotes. "If a white man . . . enters one of our cabins we all treat him as I do you. We dry him if he is wet, we warm him if he is cold, and give him meat and drink that he may allay his hunger and thirst; and we spread soft furs for him to rest and sleep on. We demand nothing in

[1] In a paper read before the Sociological Society, Dr. Westermarck has advanced strong reasons for the suggestion that magical conceptions have much to do with primitive hospitality. The guest is in a measure feared as a mysterious stranger. Outside the house he can do no harm, but once in contact with the property or the person of his host he may on magical principles be most dangerous. Hence at once a reason for the distinction made between his treatment inside and outside the dwelling-place, and for the importance of the ceremonial of contact whereby he acquires the right to hospitable entertainment. In the same way Dr. Westermarck refers the divine protection of the beggar to a humble origin in the fear of the beggar's malediction. At the same time such explanations, however true in themselves, do not settle the question how far such fears are the expression in a form congruous to primitive thought of an ethical feeling that something is due to the suffering and the helpless.

[2] See Waitz, iii. 166.

[3] Morgan, *Houselife*, p. 61.

[4] Morgan, *League of the Iroquois*, p. 328. Similarly, Catlin (vol. i. p. 230) points out that the dog, though immensely valued, is sacrificed for a guest, if there is no other way of providing for him. Coldan (in Schoolcraft—Drake, vol. i. p. 221) remarks that the Iroquois carried hospitality beyond the bounds of "Christian civility"—a delicate way of referring to wife-lending.

return. But if I go into a white man's house at Albany and ask for victuals and drink, they say, 'Where is your money?' And if I have none, they say, 'Get out, you Indian dog!'"[1] Every one knows of the hospitality of the primitive Arab, and how a sheikh would give away his last camel, or slay his favourite horse, for a guest's benefit.[2] Often the stranger has a mysterious sanctity. The hospitable host, like Abraham, may find himself entertaining angels unawares. The wanderer comes, as in early Greece, from Zeus. "Do not treat strangers slightingly" is an Ainu saying, "for you never know whom you are entertaining."[3] A custom which alone makes possible any movement outside the boundaries of the tribe in the primitive world may well acquire a religious sanction.[4]

Mother's love is the foundation of human social life, and we are therefore prepared to find that affection and care for children by one parent if not by both is traceable to the lowest levels of humanity. But the legal position of the child is not the same in primitive society as with us. The "right to live" is a consequence of the ethics of personality and is not recognized by the savage, nor, if it were recognized, would infanticide, being an action committed within the family circle, necessarily attract the attention of any authority outside the family group. To primitive man having a severe struggle for existence the advent of a new mouth to feed is often a serious matter. Hence infanticide is a widely-diffused, though by no means universal, practice in the uncivilized world, and coincides with genuine and even devoted attachment to the child if once allowed to live.[5] If the father takes up the

[1] Morgan, *The Iroquois*, p. 329.

[2] See Palmer, *Koran*, Introduction, p. x. [3] Batchelor, p. 114.

[4] I have referred above (chap. vi. p. 244) to the extreme case of hospitality to enemies among the Bengalese hill men.

[5] A number of savage and barbarous peoples *not* practising infanticide—with special reference to female infanticide—are mentioned in Westermarck's *Human Marriage*, p. 311. Outside Africa the list is decidedly exiguous, and some of the instances are admittedly doubtful, *e. g.* the Fuegians, among whom it is only a question of the frequency of the practice (compare the statements of Mr. Bridges quoted by Westermarck, p. 313, and Hyades, p. 376), and the Dakotas, for whom see Schoolcraft, vol. iii. p. 243. Westermarck states that there is not a single known instance in Africa, but according to Waitz (vol. ii. p. 391) it is not uncommon among the Bechuana and the Zulus. Sutherland

child,[1] if the clan decides that it is to be preserved, even,[2] it may be, if it has once taken food, its life is secure. It will be carefully tended, and often savage, like civilized, parents will go without food rather than let the child go hungry. Even orphans are among many people looked after.[3] The restriction of infanticide to the weak and ill-formed marks the decay of the practice.[4]

Lastly, in their treatment of the sick and aged, uncivilized peoples differ greatly. Many are said to take great care of them. Others get a bad character from travellers. In many instances the helpless are abandoned, and in some they are, perhaps at their own request, put to a more merciful death.[5]

(vol. i. p. 116) quotes Kolben (p. 86) and Sparrman (vol. i. p. 258) as alleging occasional infanticide among the Hottentots.

[1] Thus the Roman father was said *tollere* or *suscipere liberos*. So too the German father, but here the right of putting the new-born child to death belonged to other persons as well, especially the mother and grandmother. In the Frisian laws it is allowed to the mother only. (Schröder, p. 67.)

[2] Among the Creeks infanticide required the consent of both the clan and the parents. (Schoolcraft, vol. v. p. 272.) At Sparta it was a tribal matter. The elders of the phylum examined the child to decide if it were well formed, and if not it was exposed on Mount Taygetus. (Busolt, p. 109.)

[3] Among some South American Indians the chief is the guardian of bastards and orphans. (Schmidt, *Z. f. V. R.*, 1898, p. 289.) Occasional notices of orphans suggest that the care which they receive is inadequate. (Cf. Schoolcraft, vol. ii. p. 194, The Dakotas; Waitz, vol. iii. p. 342, Indians of Oregon.)

[4] The opposite sentiment is expressed in a remarkable manner by a Toda woman. "We never kill boys. As for girls, it is different; but still we only kill the sturdy and strong; it would be a sin to lay hands on the weakly and deformed." (Reclus, p. 198.)

[5] The Andamans are said to take the greatest care of the sick and helpless (Man, *J. A. I.*, 12, p. 82), and so are the Central Australians. Among the North American Indians the aged are said to be generally respected, yet are often left behind in necessity or put to death. (Waitz, vol. iii. p. 115.) That this is not quite so inhuman as appears to us is made clear by the narrative of Catlin in the text. The Oregon Indians are said to take good care of the aged, but the sick are often neglected (Waitz, vol. iii. pp. 342–346, and Schoolcraft, vol. v. p. 654.) Among the Winnebagoes the aged and infirm sometimes suffered in seasons of scarcity, but they were helped by friends and relations, and the chief sometimes requested the U.S. Government to give such persons an extra share of the tribal annuity. (Schoolcraft, vol. iv. p. 56.) The Wintuns of California are said to be rather neglectful than otherwise of the sick and aged, and the mild statement is illustrated by the case of infirm people crawling to the river-side and being allowed to fall in and drown. (Powers, p. 231.) Among the Iroquois a reform is recorded by Morgan. The aged were formerly exposed, but after the formation of the League and of permanent villages were well cared for. (*League of the Iroquois*, p. 171.)

This is not altogether due to inhumanity. The savage, especially the nomad, cannot with the best will in the world provide for the aged as we could if we desired to do so. Catlin saw an old man left behind with tent and fire, but no weapon, while the tribe marched off. The old man himself bade them leave him. "You should all go, where you can get meat. My days are nearly all numbered, and I am a burden to my children. I cannot go, and I wish to die. Keep your heart stout and think not of me. I am no longer good for anything." With these words the ceremony of abandonment was completed, and it was certainly not wanting in dignity or pathos.[1]

6. In the earlier civilizations the solidarity of the family, cemented and extended as it often was by the development of ancestor worship, secured good treatment of the infirm and aged parent within the kindred. Towards the poor and helpless generally the Oriental civilizations teach the beauty and virtue of beneficence and consideration. This is strongly marked in ancient Egypt. The soul before the Judgment Seat winds up its repudiation of sins by claiming positive merit. "I have given bread to the hungry man, and water to the thirsty man, and apparel to the naked man, and a boat to the shipwrecked mariner."[2] The inscriptions on the tombs of kings and nobles lay stress on their goodness to the poor. They claim to be "the staff of support to the aged, the foster-father of the children, the counsellor of the unfortunate, the refuge in which those who suffer from the cold in Thebes may warm themselves,

Among the Apaches and the Western Esquimaux death is felt to be the best lot for the aged. The Esquimaux believes he will be born again young and vigorous. (Reclus, pp. 103 and 132.) The practice of leaving the sick and aged to their fate or even putting them to death is widely diffused in Africa, but there are exceptions, *e. g.* the Mandingoes, and possibly the Kaffirs (though this is denied by Waitz, vol. ii. p. 340). The custom is said to be recently extinct in Southern Nubia. (Post, *Afrik. Juris.*, vol. i. p. 298.)

[1] Catlin, vol. i. p. 216. Whatever provision there may be for the aged and infirm it is, as we might suppose, mainly a matter of the goodwill of the family or clan. It is seldom in the savage world that we read of any regular public provision. The Creeks are an exception, who are described as having public "hot houses" provided in which poor old men and women suffering from want of clothes may sleep. (Caleb Swan in Schoolcraft, vol. v. p. 265.)

[2] *Book of the Dead*, chap. cxxv., Budge's Trans., vol. ii. p. 372.

the bread of the afflicted which never failed in the city of the South." Ameny, a ruler of the nome of the Gazelle in the days of the 12th Dynasty, gives himself the best of characters as a good master and lord—

"I have caused no child of tender age to mourn; I have despoiled no widow; I have driven away no tiller of the soil; I have taken no workmen away from their foreman for the public works; none have been unfortunate about me, nor starving in my time. When years of scarcity arose, as I had cultivated all the lands of the nome of the Gazelle to its northern and southern boundaries, causing its inhabitants to live, and creating provisions, none who were hungry were found there, for I gave to the widow as well as to the woman who had a husband, and I made no distinction between high and low in all that I gave. If, on the contrary, there were high Niles, the possessors of the land became rich in all things, for I did not raise the rate of the tax upon the fields."[1]

To our ears it may seem that the gentleman protests too much, and possibly he succeeds in giving us a more vivid picture of what the feudal lords of Egypt did than of what they refrained from doing, but at least he makes the ideal standard of conduct for the Egyptian ruler clear enough.

Hospitality is still recognized as a virtue. Sinuit, who fled to the Edomite desert, describes his life there—

"When a traveller went and returned from the interior, he turned aside from his road to visit me, for I rendered services to all the world. I gave water to the thirsty, I set on his journey the traveller who had been hindered from passing by, I chastised the brigand."[2]

On the other hand, in the Maxims of Ani of the New Kingdom we see the civilized man's fear of the beggar growing up. "Let not your hand be despoiled for the man whom you do not know. He came to you for your ruin." And again, "Let your eye be open in fear lest you become a beggar."[3] Yet the Maxims preach hospitality with a touch of the later familiar gnomic sentiment—the suggestion that moderation in prosperity is a kind of surety against the changes of fortune—

[1] Maspero, p. 338. Erman, pp. 93, 94. The translation varies slightly
[2] Sayce, *Records of the Past*, vol. ii. p. 23.
[3] Amélineau, trans. §§ xviii. and xxi.

"Eat not bread while another standeth by, and thou placest not thy hand on the bread for him. The one is rich, and the other is poor, and bread remaineth with him who is open-handed. He who was prosperous last year, even in this may be a vagrant."[1]

We meet with fewer passages of this tendency in Babylonish literature. But it appears from the Incantation Tables that failure in duty to the helpless, and especially the dependant, and churlishness in refusing a request, might bring a curse upon a man.[2]

Respect for the aged is a part of the corner-stone of Chinese ethics, the duty of filial obedience. But further, benevolence generally, and the duty of the governor to the governed, are important parts of the ethical teaching. "Benevolence," says Mencius, "is the most honourable dignity conferred by Heaven," and the classical writings are full of our duties to our neighbours, and of the rulers to the mass of the people. "When sovereigns appointed inspectors," says a passage in the *Shoo-King*, "they . . . said to them, 'Do not give way to violence or oppression; and go on to show reverence for the weak and find connections for destitute women.'"[3] Corn was left, as among the Hebrews, for the widows who came to glean.

> "There shall be young grain unreaped
> And here some sheaves ungathered,
> There shall be handfuls left on the ground,
> And here ears untouched
> For the benefit of the widow."[4]

Public assistance for the aged and infirm was organized by the Emperor Tai Tsung (A.D. 627–649). Foundling hospitals were also established, and under the Ming Dynasty, Hung Wu again took up the question of the aged and infirm. Almshouses and granaries for the relief of famine are also maintained.[5] The slow disintegration of the communal life has gradually forced the higher authorities to deal with the problem of the indigent.

[1] Griffith, *World's Literature*, 5341. To somewhat similar effect, though in obscure language, Amélineau, § xxvi.: "It is God who is the giver—therefore have pity and feed the hungry."

[2] For the text, see below, Part II., chap. ii.

[3] *Shoo-King* (Tr. Legge, Part V., xi. 3.)

[4] *She-King*, vol. 2, Part II., Book vi. Ode 8. Legge's *Prolegomena*, p. 150.

[5] Laffitte, *Chinese Civilization*, pp. 53, 58.

In India almsgiving was recognized as an act of merit from the Vedic period onwards.

"The prosperity of the liberal man never decays; while the illiberal finds no comforter. He is the bountiful man who gives to the lean beggar who comes to him craving for food. Success attends that man in the sacrifice, and he secures for himself a friend in the future. He who keeps his food to himself has his sin to himself."[1]

Similarly, the Upanishads teach that "there are three branches of law. Sacrifice, study and charity are the first."[2] And again: "The divine voice of thunder repeats the same, Da, Da, Da, that is, Be subdued, Give, Be merciful. Therefore let that triad be taught, Subduing, Giving and Mercy."[3]

In Manu the obligation of hospitality is peremptory.

"A guest who is sent by the (setting) sun in the evening, must not be driven away by a householder; whether he have come at (supper-time) or at an inopportune moment, he must not stay in the house without entertainment.

"Let him not eat any (dainty) food which he does not offer to his guest."[4]

But it is due in its fulness to caste-fellows alone. Towards members of a lower caste it is optional.[5] To share one's good things is a matter of positive duty. To eat first without feeding infants, the sick and others, will cause a man to be devoured by dogs and vultures after death.[6] But no great self-sacrifice is expected.

"A householder must give (as much food) as he is able (to spare) to those who do not cook for themselves, and to all beings one must distribute (food) without detriment (to one's own interest)."[7]

The plucking of food by the wayside is allowed to the higher castes.[8] Finally, in one passage we trace a higher social conception. The Sudra is naturally a slave, but even as a slave he ought to have his due maintenance.[9]

[1] Muir, *Sanscrit Texts*, vol. v. p. 431.
[2] *The Upanishads*, Tr. M. Müller, vol. i. p. 35.
[3] Müller—*Upanishads*, Part II., p. 190. [4] Manu, iii. 105, 106.
[5] Apastamba is more modern. "If a Sudra comes as a guest (to a Brahmana), he shall give him some work to do. He may feed him after." (*Sacred Books*, vol. ii. p. 110.)
[6] Cf. Baudh., ii. 3, 5, 17. "He shall never eat without having given away (some small portion of the food)."
[7] Manu, iv. 32. [8] *Ib.*, viii. 341. [9] *Ib.*, x. 124, 125.

Hebrew legislation dealt with the problem of poverty both with a view to prevention and to cure. We know with what wonderful power the prophets denounced the oppressors of the poor and declaimed woe upon those who joined house to house and field to field. The resistance to that tendency to the depression of the poorer citizens, which accompanies economic progress, was the main burden of social morality as preached by the prophets, and took practical shape in legislation in the form of the limitation of debt slavery; release of debts, according to Deuteronomy in the seventh year,[1] and according to the later code in the fiftieth; the prohibition of usury;[2] and the insistence on equal justice between the stranger and the fatherless. Deuteronomy adds that the debtor is to fetch his own pledge from his house, to have his pledged garment restored to him at nightfall, and that neither a millstone nor a widow's raiment is to be taken. These were measures designed to prevent Israelites from falling out of the class of free men. There were besides the practical provisions for the relief of the poor. These were probably developed from common festivals of the clan, where every one had a right to claim a portion.[3] For this purpose the Book of the Covenant makes use of the Sabbatical year, in which the land was to rest that the poor might eat. But they would not eat very much from the fruits of fallow land, and so Deuteronomy prescribes that a tithe of every third year's produce shall be shared with the stranger, the fatherless and the widow. It also insists that the gleanings of the field and the vineyards be left to them.[4] The duty of almsgiving was rigidly enforced. "He who gave less than a tenth of his means was a man of evil eye."[5] There

[1] Deuteronomy xv. 1. Verse 8 says in rather futile fashion that this is not to deter the Hebrew from lending to his brother, but it does not say what is to compel him. Note that by verse 3 the law does not apply to foreigners.

[2] This appears already in the Book of the Covenant, Exodus xxii. 25, and the next verse insists that the neighbour's raiment when taken as a pledge is to be restored at sundown. Usury is uniformly allowed against the foreigner. (Deut. xxiii. 20.)

[3] Robertson Smith, *Religion of the Semites*, p. 250.

[4] Deuteronomy xiv. 28, and xxiv. 19–21. In the priestly code it would seem, however, that the tithe goes to the Levites, and it is re-enacted that the "Sabbath of the land . . . shall be food for thee . . . thy servant . . . and thy stranger." (Lev. xxv. 6.)

[5] Maimonides, quoted by Loch, Art. "Charity and Charities," *Encycl.*

were collections in the synagogues for the poor and the strangers, and there were elected almoners. Lastly, honour for the aged and regard for the afflicted are insisted upon as moral and religious duties.

In the law of Islam also almsgiving is insisted upon as one of the five practical duties of the creed. Usury is forbidden, and pronounced by the Prophet as being as cursed as almsgiving is blest.

"Those who devour usury shall not rise again, save as he riseth whom Satan hath paralyzed with a touch; and that is because they say 'selling is only like usury,' but God has made selling lawful and usury unlawful. God shall blot out usury, but shall make almsgiving profitable, for God loves not any sinful misbeliever." [1]

The spoils of the enemy were to be for the poor.

"What God gave as spoils to His Apostle of the people of the cities is God's and the Apostle's, and for kinsfolk, orphans, and the poor and the wayfarer, so that it should not be circulated among the rich men of you." [2]

But after Mohammed's time a rate on property of about one-fortieth of all that had been in the believer's possession for a year, which had originally been a contribution to the expenses of war against infidels, became converted into a kind of poor rate.[3] A plan of pensions for all Moslems was set on foot by Caliph Omar.

7. I have referred briefly to the position of the beggar and the suppliant in Homeric Greece. In Hesiod's time we find the duty of liberality still insisted upon, but the attitude to the beggar is already changing. Hesiod reprehends begging as a disgrace, and says that once beggars may be helped, or twice, and then they will be refused. He makes almsgiving a matter of reciprocity. "Love him who loves thee, and cleave to him who cleaveth to thee. To him who would have given give; to him who would not have given give not." [4] During the classical period some measure of the primitive communal

Brit., ed. x., p. 667. Loch adds that even the poor had to give alms, and a refusal was punished with stripes by the Sanhedrim.

[1] Koran, i. (*Sacred Books*, vi.), p. 44.

[2] Koran, chap. lix. [3] Palmer, *Introduction to the Koran*, p. 73.

[4] Loch, *Encycl. Brit.*, p. 660.

system still lingered. In Crete and in Sparta there was direct maintenance for all citizens at the public tables. At Athens the Phratry retained much of its old vitality. Down to Solon's time the property of the childless reverted to the clan, and even after him the same thing happened to that of intestates. Out of this stock the clan provided for orphans, and the nearest agnatic relation had either to marry or dower the orphan girl. But the new State organization also assumed the duties of maintaining needy citizens, in the first place, by public granaries and the frequent distribution of food to adult citizens on the register; secondly, by public relief to the infirm with property of not more than three *minae;* and lastly, by payment for public services, which became more and more important as the institutions of the country passed into the hands of large popular bodies.[1] Moreover, an indirect method of maintaining the roll of citizens and preventing them from sinking into slavery and being lost to the State was found in colonization, bands of Athenian citizens being led out to a newly-conquered territory and settled in lots on the land. Solon's legislation against debt slavery had already effectually blocked that broad path of degradation in the ancient world. Apart from State aid there was much private charity, and mutual help societies were frequent. Hospitality still ranked as an important virtue. In some places there were brotherhoods of public charity with a common chest, and there were resting-places and probably hospital provision for travellers at the temples.[2] The temples also were the centres of medical relief. The sons of Asklepios dwelt in their neighbourhood, and probably attended the poor gratuitously, at least at Athens. Hippocrates lays down that it should be a doctor's first duty on entering a town to attend to the poor who are sick.[3]

In Rome the economic tendency to the centralization of capital and the consequent reduction of the poorer citizens to

[1] Distribution of public money was opposed by Aristotle, who urged that the object of statesmen should be to make the mass of citizens independent, and advised that public relief should take the form of starting them in farms or in business. (Aristotle, *Politics*, 1320 A.)

[2] At Megara there were houses in the town for strangers, maintained at the public cost, and in Crete strangers had a place at the public meals. (Loch, 662.)

[3] Loch, 662, 663.

destitution and dependence took a very aggravated form, owing in part to the facilities offered by conquest and in part to the cheapness and the abject position of the slave. The legislation of the Gracchi, intended to counteract this evil, was probably valuable so far as the division of the public lands was concerned, but injurious in that it started the system of distributing corn to Roman citizens at about half the cost price, a system which had an immense and unhealthy development. The Lex Octavia restricted the right to citizens settled at Rome, and probably later legislation introduced a property test, but the Lex Clodia made the distribution gratuitous, and in the time of Aurelian there were important additions, consisting probably of oil, and perhaps of wine and clothes. The system spread to Constantinople, Alexandria and Antioch, and with the extending of civic rights to the whole of the Empire, must have tended to foster a vast and idle city proletariat.[1]

In other directions Roman charity had a more beneficent turn. Hospitals with infirmaries for sick slaves attached are mentioned in the first century A.D., while there was a chief physician in each *regio* for the poor.[2] Voluntary associations for common purposes had a vigorous vitality. There were trade guilds with a strongly-developed social life,[3] with their

[1] Loch, 664, 665.

[2] During the first century after Christ there were charitable organizations of many kinds in the Roman world. Money was given or bequeathed to buy oil and meal, which was either given away or sold at moderate prices. Poor parents received help in the bringing up of their children, until the latter could reasonably fend for themselves. There were foundations for the helpless aged, and the sick were cared for, not only by their own community, but through private agencies. Medicines were distributed free. Free burial places were provided by the community, or again from private sources.

Rich burghers supported education, and in 100 A.D. the younger Pliny gave a library and means to support it to Como, and provided a teacher for the higher branches of education, so that would-be students there were no longer forced to go to Milan. (Plin., *Epp.* iv. 13.) On great occasions it was customary to make some public gift—buildings, foundations, gladiatorial games, etc. (Friedländer, *Darstellungen aus der Sittengeschichte Roms.*, iii. p. 151.)

[3] Social intercourse appears the most prominent side of the life of the guilds. How far they were "friendly societies" in our sense is not quite so clear, but the provision for burial was usual, and at least in one case other benefits were assured. On these points, and on the immense development of the "Colleges," see Dill, *Roman Society from Nero to Marcus Aurelius*, Bk. ii., ch. 3.

special rites and their own god. They held holidays in common in which men and women both took part, and provided for the burial of their members. In fact, most of the poor belonged to funeral benefit societies.[1] The care of destitute children was undertaken by the Emperors Nerva and Trajan, who lent money at low interest to municipalities for their upbringing. At Veleia three hundred children were thus assisted. But the system, though much extended by the Antonines, fell into disuse in the troubles of the third century.

8. The problem of poor relief was now taken up by the Church. This was in its primitive form a congregation in which the poorer members were relieved out of the offerings given at the altar. As the Church became divided into parishes, the parish became the area for relief, and in Rome, under Gregory, the deacons had the care of the poor, the widows and the orphans in their districts, in each of which there was a hospital. Besides this regular relief, on the first of every month Gregory made a distribution in kind to the poor. This was the model of mediæval distribution, the parishes maintaining their poor, while the bishops and abbots set aside in addition a definite sum for their relief. Endowed charities were, in fact, springing up rapidly in the fourth century, and the Theodosian code mentions institutions for the receipt of strangers, for the poor and sick, as well as orphanages and houses for children. The tithe became a legal obligation under Charlemagne, and out of it the priests had the definite duty of supporting the poor. Almsgiving was a work of merit from the first. "If there were no poor the greater part of your sins would not be removed; they are the healers of your wounds," says St. Chrysostom. And not only was almsgiving virtuous, but voluntary poverty was an ideal. It did not escape the leaders of the Church that abuses were incidental to such a principle, and St. Ambrose recognizes the evils of pauperism and urges method in giving, though his rule is little more than a recommendation of impartiality. On the

[1] Friedländer, i. pp. 146–152. The collegia passed under State supervision and gradually developed into something of the nature of castes; members who fled were brought back and children were compelled to succeed their parents in their turn.

other hand, the dangers inherent in the conception were much aggravated by its being linked with the system of indulgences.[1] The whole conception, however, was swept away by Protestantism, which accordingly gave an impulse to the movement for substituting public for the ecclesiastical relief of the poor. Already from the growth of the towns new charitable agencies had arisen. The guilds undertook to collect for the support of their members, Boroughs established hospitals and almshouses, gave out-relief to the registered poor and supported orphans.[2] In England the disappearance of serfdom and the new independence of the working classes began to exercise the minds of the rulers of the country from the middle of the fourteenth century. The confusion between the vagrant and the independent workman seeking the best market for his labour dates back to that time, and inspires much of the severity with which the sturdy and valiant beggar is treated in the series of laws from the Edwards to Elizabeth. For, blended with just indignation at the idler and impostor was the intelligible but sinister desire of the governing classes to keep the newly-enfranchised labourer in a state of economic subjection. For this purpose it was not merely necessary to fix wages, but also as far as possible to prevent the workman from moving freely in search of a better market.[3] Hence the repressive side of the later mediæval legislation. On the other hand, as long as mediæval charity lasted much relief was given, though with little system, by the monasteries, and from 1287 onwards the parish became the area for a more or less compulsory rate.[4] The religious and economic changes of the sixteenth century produced a new situation. The suppression of the monasteries closed one source of poor relief, while the conversion of arable land to pasture restricted the labour market. Mendicants—sturdy and valiant beggars—

[1] According to Thomas Aquinas he who does an act of charity merits spiritual good through being in a state of charity, and its effect in this respect is tested by the recipient being moved to pray for the benefactor. St. Thomas recognizes that the claims on our beneficence are relative, depending on such considerations as relationship, but alms should consist of all that is superfluous, the donor retaining what is necessary to him in view of his needs, his family and his *dignitas;* but his gift should only meet the actual necessities of the recipient, and not be such as should lead to excess or apathy. (Loch, 675.)

[2] We find this system as early as the ninth century. (Loch, p. 677.)

[3] See Fowle, *Poor Law*, p. 55.

[4] Loch, p. 676.

were treated with a severity which culminated in the statute of Edward VI. offering them as temporary slaves to the first comer. But meanwhile a more humane conception was making way. Attempts were made to classify the poor and provide maintenance for the "impotent, feeble and lame who are poor in very deed,"[1] while the able-bodied were to be sent to Bridewell for correction. The movement culminated in the Act of 1601, which definitely acknowledged the duty of society as an organized body to save its poorer members from actual destitution, by appointing overseers in each parish with power to levy rates for the support of the indigent. But in the actual working of this just and beneficent principle great dangers were disclosed. The standing difficulty of discriminating between those who would and those who would not work, and the conflicts between humane sentiment and desire for economy, led by different roads to the degradation of large sections of the working class. The economical motive stimulated each locality to reduce the number of mouths that it might have to feed, and so led speedily to the Act of Settlement (1662), which enabled the overseers to compel any immigrant into their parish to return to his original abode, unless he could give security to the new parish that he would not become chargeable to it. Thus, on the one side,[2] the Poor Law threatened the working classes with a new serfdom. On the other, it tended when laxly administered to general pauperization, and issued towards the close of the eighteenth and the beginning of the nineteenth century in a system whereby regularly insufficient wages were regularly made good at the expense of the ratepayers.[3]

The worst features of the Act of Settlement were repealed in 1795, and the whole system of the Poor Law revolutionized in 1834. With the workings of the new system thus constituted and the problems to which it has given rise I must not here attempt to deal. But the broad principles underlying the attitude of the modern State towards the poor must be summarily indicated. The fundamental principle of 1601—that it is the duty of the public authority to see that no one actually perishes for want of necessaries—seems to be accepted—if sometimes in

[1] From the Statute of 1551. Fowle, p. 57. [2] See Chap. vii. p. 322.
[3] On the growth of the English Poor Law, see Loch, 676–680.

grudging terms—by modern civilized governments in general.[1] But starting from this point a considerable onward movement can be traced. First poverty and pauperism, though connected, are distinct, and this vital distinction is recognized in practice. In very varying forms, much of modern legislation has been aimed at the alleviation of poverty and the raising of the mass of the industrial classes into an economic position in which they could fairly hope to provide the means of a civilized existence for themselves, their families, and even the helpless ones who belong to them. The methods used vary according to the spirit of the age or the economic circumstances of each people. In some countries great measures of agrarian reform accompanying the emancipation of serfs have established a free peasantry upon the soil. In our country, where the divorce of the labourer from the land remains, much has been done by reducing or abolishing the taxes on the necessaries of life, by sanitary legislation, by Factory Acts, and by the recognition of the right of combination. Such legislation as this belongs to the organic life of the modern State—it is among the processes of its healthy growth towards a fuller, completer existence. To such growth diseases are incident, and among them pauperism is one of the chief. In dealing with this disease the effort of state-controlled and voluntary agencies alike is more and more directed to disentangling causes —to discovering what is due to lack of employment, what to physical incapacity, what to faults of character. It may frankly be admitted that we as yet have not much to boast of either in our diagnosis of causes or in our capacity to find remedies for each specific form of the disease. But it is something to have recognized that to have the poor always with us is not a blessing, and that the duty of the rich is not exhausted by the most liberal giving of alms. Public and private charity have in fact undergone a transmutation which reflects the general change from the mediæval to the modern order. Free bounty in alms is the virtue appropriate to the lord dealing with humble dependants, just as easy-going communism was natural to the

[1] See for France, Sweden, Denmark, Prussia, Holland, Austria, and the United States—Fowle, *op. cit.*, pp. 6, 7. There is sometimes an attempt to distinguish between the duty of the State and the rights of the recipient, which ethically amounts to very little, though it might have legal importance.

primitive clan. A reciprocal obligation binding the individual to work for his living and the State to see that no one of its members fails to obtain the bare essentials of a civilized existence is appropriate to a society resting on the recognition of personal rights. To develop these two principles in their full meaning, so to apply them in practice as to avoid any form of compulsion which would interfere with the equally stringent principle of personal freedom, to adapt them to varying circumstances in such wise as best to help him who is impoverished through no fault of his own to regain his place in the ranks of independent labour, while yet taking suitable care of those who are mentally or morally incompetent to manage their own lives —these are problems which the future may solve. The most that we can claim for ourselves is that we are beginning to state them with precision.

The poet tells us that with the advance of civilization the individual withers, but the truer romance of historical prose tells a different story. In early society the individual is nothing apart from his community. The sphere of private property is very small and the power of the individual to enter into new relations by contract and so carve out a career is even less. Land, the principal source of wealth, is communally owned and there is little incentive to individual industry. On the other hand, if there is no wealth, there is also no pauperism. Inequality grows as society advances, and in this advance, on its economic side, private ownership and free contract play the principal part. Yet both these factors are still greatly hampered in the early and middle civilizations by feudal tenures and caste restrictions. So far as these remain the structure of society is still comparatively immobile. The position of the individual is still determined more by inherited status than by his own deserts.

At a still higher stage these restrictions fall away. Men stand fully free to enter into occupations of all kinds, to acquire wealth in all forms, and to dispose of and (in many cases) bequeath it at their will. No divisions of class or even of nationality interfere with their movements or prevent them from entering into relations with other men in which they may find advantage. But these general statements have to be taken with one limiting

condition. The liberties that men enjoy are secured only by the social order maintained by the State, and the State in its turn has to demand that every right must be defined in terms of the common good, and neither private property nor free contract can escape this general law. Thus the modern world rests in a fuller sense than previous civilizations on the free individual, but the individual owes his freedom to state law, and the obverse side of the rights which he enjoys is the social duty which he owes. Society has freed him from other ties, but not from the tie which binds him to the social life. If the individual is one pole, society as a whole is the opposite pole of the modern ethical system.

Finally, customs admitting the acquisition and holding of property have as their reverse side the necessity for dealing with those who have and can acquire none. Here we have a quite parallel evolution. In primitive society there is an easy communism among the kinsfolk, often—but by no means always—much consideration for children, the aged and the helpless, and lavish hospitality for the stranger if the host chooses to receive him. In the more advanced societies the duties of the governing classes are strongly insisted on by religion and social ethics. Those whom the decay of primitive communal institutions has left helpless and who have fallen outside the regular lines of the social structure are recommended to the charity of their superiors. The lords of the land must be merciful and forbearing to their dependants. The rich are taught to give freely out of their abundance to the poor. At a higher stage, again, the method of arbitrary doles to a dependent class gives way to the conception of a reciprocal obligation between the State and its citizens, and contented acquiescence in perpetual poor relief to the systematic attempt to get at the roots at once of poverty and pauperism by organic reform in the economic structure of society.

SUMMARY

We have now considered in outline first the main principles underlying different forms of social organization; secondly, the manner in which the behaviour of individuals is regulated, their duties enforced and their rights maintained; and thirdly, a number of the rules determining in the main relations of life what those rights and duties are. We saw that primitive society rested on ties spontaneously formed by blood-kinship, by intermarriage and perhaps by mere neighbourhood; that the social structure is extended and in some respects also consolidated by the rise of military power and the separation of rulers and ruled; we saw that the principle of force, underlying government at this stage, is transmuted and partially moralized by ethical and religious influence into a principle of authority, exacting obedience of its subjects as a right, but owing them consideration and paternal government as a duty. We saw finally that in the higher civilizations a new principle makes headway, whereby the fabric of society comes to rest rather upon the goodwill of the citizens and the social nature of man, while the claims of government are based not on self-constituted authority backed ultimately by the sword but on the necessity of an ordered rule in the interests not only of social co-operation, but of individual freedom.

In the maintenance of rights and redress of wrongs, the movement, broadly viewed, is parallel. Starting from the entire lack of regular methods for enforcing justice which appears here and there in the lowest peoples, we soon pass into the stage of the blood feud in which rights are maintained and wrongs punished by the parties interested or their kinsfolk. From this we ascend by many gradations to the impartial justice of a public tribunal,

investigating each case by rational process, distinguishing crimes from civil wrongs and limiting the responsibility for a wrong to the individual perpetrator. Growing up, as a rule, under the shadow of the principle of authority and acting in the interests of external order rather than of personal rights, the law is administered often with insufficient safeguards for the innocent and with cruel severity to the criminal, and the next step is to remedy these defects by changes aimed at reforming the criminal and cutting off the sources of crime. At each step there is an advance in the maintenance of order, and on reflection we recognize that the better maintenance of order means greater security for individuals in the enjoyment of their rights. Again, the elaboration of the legal view of responsibility isolates the individual from the groups which in primitive society stand and fall together. But it isolates him from these only to bring him into close dependence on a wider society—the state as a whole, to which he finds himself bound by mutual obligations of duties and rights.

In the position of women and the structure of the family we find a development which, if not parallel, is yet analogous. We have seen the natural family beginning with a relatively loose organization, and passing into a state in which close-knit relations were obtained at the expense of the subjection of the wife, while the aim of the higher civilizations appears to be to reconcile the intimacy of the union with equal freedom for both parties. The movement is on the one hand towards closer structure, on the other to personal freedom, and the problem is again to reconcile the claims of personality and the duties of a common life, though this common life is here that of two individuals rather than that of all society. On the other hand, in the position of women, economically and socially, apart from the question of marriage, it is the idea of personality that is mainly prominent. For in the early stages there is little respect for women, and, so far as labour is divided, it is more often than not to their disadvantage. Then with the growing dependence of the wife arises as a partial compensation the view that woman has a sphere of her own, in some ways higher than that of her lord. But when this view, which carries in it the seeds of a deeper respect for women than the older world conceived, is

pushed to its conclusion, it is seen that to realize what is in them, women too must have the open field which men demand, and be free, if it be only to work out and establish their diversity.

From sex we passed to other divisions of human beings which affect the conception of moral obligation. In the primitive world every man is a member of a group to which his obligations strictly so-called are limited, members of other groups being indifferent or hostile. From this "group-morality" arises first the problem of intertribal, or, as they afterwards become, international relations. In the early stages these relations are frequently hostile, and hostility is directed towards the individuals of the opposing community, and not merely against the community as a corporate whole. A step onward is taken when the personal character disappears from warfare and the result of victory, even if pushed to the point of annexation, is not to cancel the rights of the conquered or to punish them for attachment to their own side. Lastly, in this fuller recognition of a common humanity—for that is what it amounts to—we find the beginning of a more far-reaching conception of a law, and therefore ultimate of a society of nations to which each independent state owes allegiance.

Considered internally, the small primitive group was found to be—apart from the distinction of sex—generally speaking, a society of equals. Differences of class, or caste, and the distinction of free man and serf or slave, arose in the earlier phases of social growth. On this side personal rights are apt to suffer deterioration in the earlier phases of social advance. The growth of a large order and a firm authority is hostile at the outset to the maintenance of individual freedom and social equality. Ethical and religious progress tends to redress the balance, and the claims of personality reassert themselves piecemeal in the higher civilizations. But this wider recognition of personal rights implies that the barriers which divide classes and sections of the community are overcome, and a true social unity achieved.

Turning from the rights of person to those of property and contract, we have seen the simple communism of primitive peoples give way to a system of free contract and individual

ownership, from which the hampering restrictions of caste and feudal status gradually fall away. Once again individual energy and initiative are set free from all restrictions, but once again individual freedom was seen to raise questions of social control. Finally, in the treatment of the poor we have traced an analogous movement from simple communism through the paternal benevolence of a superior caste to the recognition of a mutual obligation as between the individual and the state.

Thus amid all the variety of social institutions and the ebb and flow of historical change, it is possible in the end to detect a double movement marking the transition from the lower to the higher levels of civilized law and custom. On the one hand the social order is strengthened and extended. The blood feud yields to the reign of law, personal chieftainship to a regular government and an organized police. At the same time the social organization grows in extent. Instead of small primitive groups we have nation-states or continental empires, great areas enjoying internal peace and owning a common law. On this side the individual human being becomes more and more subject to social constraint, and, as we have frequently seen, the changes making for the tightening of the social fabric may diminish the rights which the individual or large classes of individuals can claim, so that fewer rights may be enjoyed, though, with the improvement of public order, those which remain are more secure. In this relation liberty and order become opposed. But the opposition is not essential. From the first the individual relies on social forces to maintain him in his rights, and in the higher form of social organization we have seen order and liberty drawing together again, the underlying truth that unites them being simply that the best ordered community is that which gives most scope to its component members to make the best of themselves, while the "best" in human nature is that which contributes to the harmony and onward movement of society. Thus the modern state comes to rest more and more on the rights and duties, the obligations and responsibilities that we include under the ethical and legal conception of personality. The responsible human being, man or woman, is the centre of modern ethics as of modern law, free so far as law and custom are concerned to make his own life,

bound by no restrictions of status nor even of nationality or race, answerable for his acts and for those of no other, at liberty to make the best or the worst of himself, to accept or decline relations with others. On the other hand, as this free individual breaks the shell of the older groupings, he comes into direct relations with the state as a whole which succeeds to many of the rights and duties of the older groups. The social nature of man is not diminished either on the side of its needs or its duties by the fuller recognition of personal rights. The difference is that so far as rights and duties are conceived as attaching to human beings as such, they become universalized, and are therefore the care of society as a whole rather of any partial group organization. The typical instance of this change is the rise of public courts enforcing a law which is equally binding on all members of society. But lastly, the universalism which the idea of personality holds within it cannot be satisfied with the limits of the nation-state. In proportion as obligations are determined by human nature as such they overstep national and racial as well as family and class limitations, and apply to humanity as a whole. Hence, as has been seen in analyzing the idea of internationalism, the double meaning of "humanity" as an expression for a certain quality that is in each man, and as an expression for the whole race of men, is not a mere ambiguity. The two meanings are intimately related, for "humanity" as a whole is the society to which, by virtue of the "humanity" within each of us, we really belong, and these two meanings are the poles between which modern ethical conceptions move. Thus if we are to sum up the whole process sketched in this volume in a phrase, we may say that it is in this double sense to realize humanity.

The controversies which have filled modern history attach themselves in their ethical aspect sometimes to one side, sometimes to the other of this principle. Of many of these little has been said in this volume, because in outline the facts are well known and a detailed discussion would be impossible within the limits of a general sketch. It may, however, be pointed out that the ethical questions which have agitated the modern world from, say, the period of the Reformation to our own day have turned either on the vindication of personal right, or on the

extended conception of human brotherhood. On the one hand, ethical progress has taken the form of a protest against the principle of authority which at the outset of the period everywhere dominated the world, and, so far, has tended to curtail the sphere of government in favour of individual liberty. This is the history, for example, of the very gradual process whereby first liberty of conscience and finally religious equality has been established as a corner-stone of the modern state. This change is sometimes represented as merely a consequence of religious scepticism, the implication being that if the world held itself as certain of fundamental truths as it did in the twelfth century it would not hesitate to impose them on all its members by force as it did then on the rare occasions which arose. But there is a deeper principle involved, illustrating the many-sided meaning of the idea of Personality. Far from implying an indifference to religion, the principle of religious equality is a recognition of the profound importance of intellectual sincerity, particularly in relation to the deepest problems of life. From the moment that honesty is recognized as a duty it becomes increasingly repugnant to penalize the beliefs to which it may lead. The heavier the penalties the more exclusively they fall on the stoutest and best natures, that is precisely on those best qualified under happier circumstances to serve society; and the only logical alternative is to admit the necessity for divergencies in an imperfect world.

It is not to be supposed that this principle is free from logical defects or practical difficulties. It is easy to show that there are or may be opinions which in some relations must disqualify the holder. For example, a sincere conviction which would prevent a man from conscientiously discharging the duties of a particular office must disqualify him from holding the office. But the principle of freedom in opinion would merely require that his unorthodox or unpopular views should not disqualify him for other offices with which they are not concerned. In other words, freedom is limited by responsibility. A man undertakes to fulfil a certain social function, to administer, to teach, or to preach, and it is expected that he will fulfil and not exceed that function, and as long as he does so his thoughts are his own. There is thus a certain logic below the apparent compromises of public life, which, by enabling men of most diverse views to co-operate

without injury to their own self-respect, secures the best brains and the highest characters for the public service.

The modern state undoubtedly uses constraint, as every organized society must do, but the grounds on which constraint is justified in the modern world are distinctive and significant. For constraint may be justified, and in the older conception was justified, on the ground that if a man will not do what he ought he must be made to do it, and it may be applied to speech and writing on the ground that if it is wrong to do a thing it is equally wrong to recommend it. But it is precisely in these two relations that compulsion most offends the modern idea of liberty. To force a person to act rightly for his own sake implies an ethical confusion, for it is only in so far as he acts freely that his actions have ethical value. Conversely to suppress free speech is to bring force into the true spiritual world—the world of ideas, where it is most urgent both from the personal and ultimately from the public point of view that there should be freedom. On the other hand, when the freedom of one man is used to the molestation of another or the hindrance of what are deemed his legitimate activities, constraint is required. And if individual freedom may not be used to the prejudice of another individual, neither can it claim the right to thwart the will of society as a whole. Hence an important distinction which will be found to underlie much of modern legislation. As long as the general will can be carried out effectively without compelling the reluctant minority to follow suit, the tendency is to avoid compulsion. On the other hand, where certain conditions are believed to be essential to the common good, and the recusance of a minority, perhaps of a few individuals, would render them unattainable, compulsion is deemed legitimate. In such cases it is felt that the general will, dealing with general interests, has rights quite comparable in kind to those of the individual will in relation to its individual interests, while to enforce compulsion is after all only in accord with the universally admitted limit to liberty that it does not convey the right to injure others. Further, compulsion is limited to actions, since words alone cannot impede a resolute majority from doing what they wish to do, unless indeed their convictions are a little shaky, and in that case it may perhaps be

all the better for them to hear the other side. Again, in leaving expression free the law leaves to each man what is peculiarly his, the right to think for himself and honestly express his convictions whether he is allowed to act by them or not. In all these ways the idea of personality seems to have profoundly influenced the theory and practice of legislation, tending not always to the curtailment of social activity—for, as we shall see later, it has a counter tendency in the enlargement which it gives to the conception of the common good—but certainly to the material modification of the character and aims of law.

Freedom of discussion practically implies the influence of discussion upon government, and the doctrine of popular sovereignty with universal suffrage drew its strength first in the modern world from the conception of the right of each individual to have a voice in determining the laws under which he has to live. The democratic movement was directed at the outset against arbitrary power. Its first demand was for personal freedom, *i. e.* immunity from arbitrary treatment and security in the possession of legal rights. The political rights which came next appeared naturally as an extension of this freedom and as another check on governmental authority. But as soon as they were adequately secured and the ultimate sovereignty of the people was realized, the notion of a check on government became inadequate. The people as a whole could not be engaged merely in checking itself. In point of fact whenever it was a question of extending the franchise it was another side of the principle of personality, the idea of equal rights, that came forward. But this idea, while founded on personality, is meaningless apart from the conception of something which all share alike, and equality in political rights therefore implies a community in which members have an equal right to take part in the functions of government—that is to say, merely a more perfect or more complete community than one in which certain members are wholly or in part excluded from the common life. Political democracy therefore seems to range the whole distance between the two poles of the humanitarian idea, resting on the principle of personality on the one hand and of the all-embracing community on the other.

The family and the state are not the only communities which

men form. On the contrary, a leading characteristic of the modern world is the ease with which people combine for purposes of all kinds, from that of hearing each other's views on Browning to that of regulating wages or promoting the passage of a Bill in Parliament. The right of association is one which often raises grave political and social problems, and, strangely enough, it can be brought into contact with both poles of our "underlying principle," and in either case it may receive support or opposition according to the reading of the facts. Take the case of Trade Unions. These were as a matter of history legalized in England under the influence of individualistic ideas, the ground taken being the right inherent in individuals to associate together freely for the promoting of their several interests. Yet the strength of a Trade Union lies entirely in the Collective Bargain, and its moral force is derived wholly from the conception of the workers in a given trade—ultimately, perhaps, all the manual workers of the country—as forming a community with certain objects in common. So far the Trade Union finds support both in individualism and collectivism. Yet from both ideas it is possible to derive arguments against the right of combination. On individualist grounds it may be condemned as impairing the rights of the non-Unionist, on collectivist grounds as forming a state within a state, and assuming functions which only the government representing employers as well as employed, brain workers as well as manual workers, can fairly carry out. Hence in point of fact Trade Unionism has always been opposed by the more extreme among Individualists and Socialists, and has found support among the more moderate of each party. The movements of opinion and of English legislation on the subject from 1800 to the present day reflect with tolerable accuracy the fluctuation of thought between these poles, according as now one, now another, aspect of the problem took the leading place in the public mind, the tendency being upon the whole to recognize the necessity of voluntary combination as a remedy for the economic weakness of the mass of manual workers and to bring it by the definition of its rights and responsibilities more closely into connection with the State system.

What has been said of Trade Unions applies *mutatis mutandis*

to voluntary association in general. The State organization is far from exhausting the necessities of common action. It can use its power of compulsory taxation to carry out certain objects of common interest. But precisely because it uses compulsion, it has to give fair consideration to all classes and all sections and cannot wisely proceed further than the general opinion of the community warrants. Voluntary associations, on the other hand, which exercise no compulsion on any one except on their own members, who freely join and are free to leave them, may rightly pursue a thousand and one laudable objects for which a combined effort is necessary, but which perhaps appeal only to a few. Thus the fuller development of the principle of community or association does not necessarily imply a continual expansion in the sphere of State activity. On the contrary, the activity of voluntary combination has developed and is developing with at least equal rapidity.

Under the name of voluntary association we think naturally of combinations deliberately formed for some definite purpose. But there is also a form of common life into which men fall, if not hindered, by a kind of instinct, a life based on old traditions, and a certain community of character, language, custom, and generally religion, all that goes to make up the impalpable but very real bonds of nationality. Struggles for national freedom have made a large part of the modern movement, and have generally been associated with ideas of personal liberty and of popular sovereignty. Yet the connection of thought is not always easy to make out. Where a race is definitely held in subjection by an autocratic government which concedes to it neither political nor equal civil rights, the case is indeed clear enough. So far it does not differ from that of any disfranchised class. But further, though fully enfranchised, a nationality may be incorporated against its will with a larger nation in one political community, and its separatist aspirations may then be regarded as having no special sanction in the principle of Liberty and as being opposed to the widening of human brotherhood in that they tend to split up society and perpetuate divisions. As to the first point, the proof of the argument is in practical experience. If it turns out possible to maintain the undesired union without special restrictions on the political and

personal rights of the recalcitrant people, well and good. But the stronger the national feeling, the less likely is this to be the case and the further are governments driven along the road of coercion and into the forbidden ground of the modern spirit, where men are made to suffer most in proportion to their nobility and steadfastness of character. The heroes of nationalism have, wherever their cause has flourished, connected it with that of personal right, and put their opponents into the odious position of punishing men for qualities which in a cool hour they must themselves admire. From the social point of view, again, if fewer differences existed the problems of social organization would be much simpler, but the social life would also be poorer. At this point divergences in the conception of a community come to a head. If the best community is that in which the order deemed most suitable by the wisest heads is imposed on all members without regard to their wishes, then differences of nationality can expect little consideration. But if the best-ordered society is that which makes most room for the self-development of many different types, the case is altered, and just as there is free play for the individual so also is there room—though to make it may involve great changes in the governmental machinery—for those groupings of individuals which spontaneously form and stubbornly maintain themselves against legal pressure. Thus from several points of view the re-grouping of peoples according to national divisions, which has made up so much of modern history, falls into its place as part of the wider movement which has replaced the arbitrary government of authority by the political state resting on the common good and general assent of the great bulk of its citizens.

Probably in all the movements here mentioned the side which has been most prominent in history has been the vindication of individual or group rights as against governmental authority. But it would be a mistake on that account to identify them with any general tendency towards individualism as against the claims of the common life. On the contrary, at every step the fuller recognition of rights implies a deepening sense of common responsibility, since, as has been repeatedly asserted, the recognition of a right implies its maintenance by society. From the assumption of the duty of protecting life and limb onwards the

development of the modern state has witnessed an extension of the sense of collective responsibility—a responsibility which may almost indifferently be stated in terms of the rights of individuals or the duties of society. On whichever of the two principles, in practice the modern state guarantees the bare necessaries of life to all its members, and adds thereto in varying degree the conditions of something more than a bare life. In a long series of industrial statutes it has sought to ensure the safety and health of the working class, and to protect its members from fraud and oppression. It maintains a certain standard of sanitation in buildings, provides or encourages facilities for transport, and gives the rudiments of education without charge. How much further the State machinery can be profitably used in this connection is matter of controversy into which I do not inquire here. But whether trust be put in the machinery of law or the efforts of voluntary agency, the sphere of combined action grows in proportion as the respect for human personality deepens. The obligation to do what is in them to make life more human will be felt by some as a debt which they owe to suffering human beings, by others as something due to society. But in this relation at least it is easy to recognize that it is the same principle which is seen from two different sides, and that the conscious efforts to better the life of humanity in which the whole tendency of modern thought is summed up can work through no other channel than the humanity which is alive in every man and woman.

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